TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 429

JAMES S. PATTERSON, GENERAL ADMINISTRATOR FOR MOBILE COUNTY, ALABAMA, ETC., LEONARD LESTER SULLIVAN, MELVIN A. HAYS, ET AL., PETITIONERS,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 8, 1958
CERTIORARI GRANTED NOVEMBER 24, 1958

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

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INDEX

	Original	Print
Proceedings in the United States Court of Appeals for the Second Circuit		
Appendix to Appellants' brief consisting of proceedings before the United States District Courts for the Southern and Eastern Districts of New York	1	1
Docket entries (Vallebuona)	1	1
Docket entries (Patterson)	2	2
Docket entries (Sullivan)	4	3
Docket entries (Duncan)	5	4
Docket entries (Hays)	6	5
Libel (Sullivan case)	7	6

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	Original	Print
Appendix to Appellants' brief consisting of proceedings before the United States District Courts for the Southern and Eastern Districts of New York—Continued		
Exceptive allegations of respondent	11	9
Opinion, Kaufman, J.	13	10
Libel (Patterson case)	18	14
Answer	22	17
Respondent's exceptive allegations	26	20
Opinion, Dimock, J.	28	22
Order sustaining exceptive allegations and dismissing libel	32	25
Libel (Duncan case)	33	26
Respondent's exceptive allegations	37	29
Memorandum endorsed on motion papers	38	30
Order sustaining exceptive allegations and dismissing libel	39	31
Libel (Hays case)	40	32
Answer	48	39
Respondent's exceptive allegations	53	43
Memorandum endorsed on motion papers	54	44
Libel (Vallebuona case)	55	44
Respondent's exceptive allegations	59	47
Exhibit "A"—Compensation order	61	49
Exhibit "B"—Order modifying compensation order	63	51
Opinion, Inch, J.	65	53
Order sustaining exceptive allegations and dismissing libel	67	54
Opinion, Patterson, Sullivan, Hays and Duncan cases, Hand, J.	68	55
Per curiam opinion, Vallebuona	72	58
Judgment (Patterson case)	73	59
Judgment (Sullivan case)	75	59
Judgment (Vallebuona case)	77	60
Judgment (Hayes case)	79	61
Judgment (Duncan case)	81	61
Clerk's certificate (omitted in printing)	83	62
Order allowing certiorari	84	62

[fol. 1]

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Appendix to Appellants' Brief

ALBERT VALLEBUONA,

vs.

UNITED STATES OF AMERICA.

DOCKET ENTRIES

Date	Proceedings
1954	
Feb. 23	—Libel filed.
Feb. 26	—Affidavit filed re service of a copy of libel.
June 16	—Exceptive allegations filed of U. S. A.
June 23	—Notice filed of hearing on exceptive allegations (returnable July 7, 1954).
July 7	—Byers, J. Hearing Exceptions adjd. 7/21.
July 21	—Inch, J. Hearing on Exceptions held—Decision Reserved. Copies of Original Documents Filed from Washington, D. C.
July 21	—Affidavit of Jacob Rassner filed.
July 22	—By Inch, J. Memo rendered on exceptions. Exceptions sustained. Libel dismissed (See memo on the motion papers).
July 27	—By Inch, J. Order filed on above re dismissal of libel, etc.
Aug. 2	—Notice of Appeal filed (libellant) (Seaman).
1955	
June 17	—Stipulation filed re record on appeal.
June 21	—Papers mailed to U. S. C. A. re appeal.
June 23	—Index filed together with acknowledgment of original papers, etc. (from U. S. C. A.).

[fol. 2]

JAMES S. PATTERSON, General Administrator for Mobile County, Alabama, as Administrator of the Estate of Edgar A. Doody, Jr., deceased,

v.

UNITED STATES OF AMERICA.

DOCKET ENTRIES

Date	Proceedings
1947	
July 30	Filed Libel & Stip. for costs ($100.00 National Surety Corporation).
Nov. 17	Filed Stip. & order extending time to answer. Clerk.
Dec. 17	Filed Stip. & order extending time to answer to 1-15-48. Clerk.
1948	
Jan. 19	Filed Stip. & order extending time to answer to 2-9-48. Clerk.
Jan. 21	Filed Answer of United States of America.
Oct. 7	On Call of Pre-Trial Before Knox, J. Hearing adjourned to 11/9/48.
Nov. 22	On Call of Pre-Trial Before Knox, J. Marked—T. C. (No cal. 11/9/48).
1951	
Feb. 28	Filed Notice of Change of Firm Name.

[fol. 3]

Date	Proceedings
1952	
Mar. 6	Filed Affidavit for adjournment.
Apr. 8	Filed Affidavit for adjournment.
Dec. 2	Filed Affidavit for adjournment.

1953

Sept. 30—Filed notice of appearance for U. S. A.

Sept. 30—Filed affdvt. & notice of motion to dismiss—lack of juris.—Ret. 10-6-53.

Oct. 6—Memo endorsed. Marked off. on request. Weinfeld, J.

1954

Oct. 11—Filed Respondent's exceptive Allegations.

Oct. 13—Filed notice of hearing on exceptive allegations. Ret. 10/28/54.

1955

Feb. 3—Filed Opinion #21680. Dimock, J. Exceptive Allegations sustained. Libel dismissed.

Feb. 9—Filed Order dismissing libel. Dimock, J.

Feb. 14—Filed notice of appeal (Mailed copy to U. S. Atty on 2/14/55).

May 25—Filed stipulation re Record on Appeal.

May 25—Filed notice of Certified Record on Appeal to U. S. C. A.

[fol. 4]

LEONARD LESTER SULLIVAN,

vs.

UNITED STATES OF AMERICA.

DOCKET ENTRIES

Date Proceedings

1953

June 29—Filed libel.

Sept. 30—Filed exceptive allegations to libel.

Sept. 30—Filed notice of motion exceptions to libel—Ret. 10-6-53.

Oct. 6—Memo End. on motion filed 9-30-53—marked off—Weinfeld, J.

1954

Dec. 20—Special pre-trial before Knox, Ch. J.—Hearing held & adjd. to 4/13/55

1955

Feb. 16—Filed stip. & order restoring motion for hearing on respondent's exceptive allegations. Ret. 3/8/55.

Apr. 13—Special pre-trial before Knox, Ch. J. Hearing held. Case Marked off Pre-Trial Calendar.

Apr. 15—Filed opinion #21839 Irving R. Kaufman, J. Exceptive allegations are sustained and the libel dismissed. So ordered.

May 10—Filed notice of appeal. Mailed copy 5/10/55.

May 25—Filed stipulation re: Record on Appeal.

May 25—Filed notice of certified record on appeal to U. S. C. A.

[fol. 5]

STERLING EUGENE DUNCAN,

vs.

UNITED STATES OF AMERICA.

DOCKET ENTRIES

Date	Proceedings
1953	
June 29	Filed libel.
1954	
Dec. 20	Special pre-trial before Knox, Ch. J.—Hearing held & adjd. to 4/13/55.
1955	
Apr. 13	Special pre-trial before Knox, Ch. J. Hearing held. Case Marked off Pre-Trial Calendar.

Apr. 21—Filed respondent's exceptive allegations.

Apr. 22—Filed notice of hearing on exceptions. Ret. 4/28/55.

July 19—Memo end. on exceptive allegations filed 4/22/55. Exceptive allegations sustained. Submit order. Palmieri, J.

July 27—Filed order sustaining exceptive allegations and dismissing libel. Palmieri, J.

Aug. 8—Filed Notice of Appeal. (Mailed copy 8/8/55).

Oct. 19—Filed Stipulation re record on appeal.

Oct. 19—Filed notice of filing of certified record on appeal.

[fol. 6]

MELVIN A. HAYS,

vs.

UNITED STATES OF AMERICA.

DOCKET ENTRIES

Date	Proceedings
1953	
Dec. 21	Filed libel.
1954	
Mar. 5	Filed affidavit of service upon U. S. Atty and Attorney General.
May 4	Filed answer.
Dec. 10	Filed note of issue for trial.
1955	
Apr. 21	Filed notice of motion re: leave to file exceptive allegations. Ret. 4/26/55.
Apr. 26	Memo. end. on motion papers filed 4/21/55. Motion granted. No opposition. Settle order on notice. Weinfeld, J.

Apr. 28—Filed order granting motion to file exceptive allegations etc. Weinfeld, J.

Apr. 29—Filed respondent's exceptive allegations.

May 2—Filed notice of hearing on respondent's exceptive allegations. Ret. 5/10/55.

July 18—Memo end. on respondent's exceptive allegations filed 5/2/55. Respt's. exceptive allegations are sustained and the libel dismissed. (see memo). Bicks, J.

Aug. 11—Filed notice of appeal. (Mailed copy 8/11/55).

Oct. 19—Filed stipulation re: appeal record.

Oct. 19—Filed notice of filing of certified record on appeal.

[fol. 7]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LIBEL (SULLIVAN CASE)—Filed June 29, 1953

To the Honorable Judges of the United States District Court for the Southern District of New York:

In Admiralty—Ad. 178-292

The libel of Leonard Lester Sullivan against the United States of America, in an action under the provision of the Suits in Admiralty Act of 1920, for the recovery of damages for injuries sustained and for maintenance and cure, respectfully alleges, on information and belief:

For a First Cause of Action:

First: At all the times hereinafter mentioned, the towboat "ILLINOIS" was and still is employed as a tugboat.

Second: The respondent, the United States of America, at all the times hereinafter mentioned, through the Inland Waterways Corporation, a corporation whose stock is wholly owned by the United States of America, owned, manned, operated, managed and controlled the towboat "ILLINOIS".

Third: The libelant was employed aboard the "ILLINOIS" and joined same at a rating of deck-hand, at a regular monthly wage of $275, together with bonus, overtime, and maintenance, all under the customary ship's articles, and, at all the times hereinafter mentioned, except as otherwise set forth, continued in such employment.

Fourth: It was the obligation and duty of the respondent to furnish libelant with an adequate number of officers and co-employees; to provide libelant with a skilled, careful, and competent Master, and skilled, careful, and com- [fol. 8] petent officers and co-employees; to furnish libelant with a safe place in which to do his work; to supply him with suitable and safe means, materials, and appliances in and for the performance of his work; to maintain the same in proper condition for the proper performance of the said work; to promulgate and enforce proper rules in relation to the foregoing and to inspect the aforesaid materials, appliances, and means; to provide libelant with a safe and seaworthy vessel; and to warn the libelant of the dangers to be encountered in the performance of the said work.

Fifth: That on or about the 4th day of May, 1952, while libelant was acting within the scope of his employment, and in the interests of the respondent herein, he was caused to become seriously injured, as hereinafter more fully described, all by reason of the carelessness and negligence of the respondent, its officers, agents, servants, employees, and other persons for whom the respondent was responsible, and in violation of the aforesaid duty and obligation, without any fault or negligence upon the part of the libelant herein.

Sixth: That on or about the 4th day of May, 1953, as aforesaid, the libelant, while engaged in the course of his duties aboard the said towboat, was suddenly caused to slip and/or trip against a certain cable, lines or other foreign substance negligently and carelessly maintained on, at and about the deck of the aforementioned towboat; that as a result of slipping or tripping as aforesaid, libelant was caused to strike his back, person and body, with attendant damage to his muscles, tissues, tendons and vessels and to his nerves and nervous system, has suffered, and will

suffer great pain, agony and mental anguish, has paid out and will pay out, large sums of money for medical and surgical attention and medicines; has lost and will lose large sums of money which he otherwise would have earned [fol. 9] as wages and in the form of board and lodging; that he has been forced to defray the expense of his maintenance and cure; and that libelant verily believes he has been permanently injured; all to his damage in the sum of Fifty Thousand ($50,000.00) Dollars.

Seventh: The "ILLINOIS" is now, or will be at the time of serving and filing this libel, or during the pendency of this action, within the territorial jurisdiction of the United States.

Eighth: This suit is brought under the provisions of the Suits in Admiralty Act and all acts and statutes supplemental thereto and amendatory thereof, and the provisions of Merchant Marine Act of 1920, commonly known as the "Jones Act", and all acts and statutes supplemental thereto and amendatory thereof.

For a Second Cause of Action:

Ninth: Libelant realleges each and every allegation contained in paragraphs "First" to "Eighth", inclusive, as fully and completely as though here repleaded at length.

Tenth: The aforesaid injuries were sustained in the line of his duties while actually engaged in the ship's business, without any fault or negligence on his part. The libelant sues hereunder for maintenance and cure and alleges the case amounts to Twenty-five Thousand ($25,000) Dollars.

Eleventh: All and singular the premises are true and within the Admiralty and Maritime Jurisdiction of the United States of America and of this Honorable Court.

Twelfth: On or about the 8th day of September, 1952, a formal claim, pursuant to Public Law 17, was forwarded [fol. 10] to the United States Maritime Administration, Department of Commerce, Washington 25, D. C. and a copy of said claim was mailed to the Attorney-General, Washing-

ton, D. C., a copy to the United States Attorney, Federal Building, New Orleans, Louisiana and a copy to the Federal Barge Lines Inc. at 611 Cavier Street, New Orleans, Louisiana. More than sixty days have elapsed between the filing of the said claim and the filing of this libel, and the said claim is deemed to have been administratively declined.

Wherefore, the libelant prays that the respondent, the United States of America, be required to appear and answer all and singular the premises aforesaid and that libelant may have a decree for the amount of the damages, to wit: Seventy-five Thousand ($75,000) Dollars, together with the costs and disbursements of this action.

Jacob Rassner, Proctor for Libelant, Office & P. O. Address: 15 Park Row, New York 38, New York.

S. Eldridge Sampliner, Esq., of Counsel.

(Verified by Jacob Rassner, June 25, 1953.)

[fol. 11]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXCEPTIVE ALLEGATIONS OF RESPONDENT, UNITED STATES OF AMERICA—Filed September 30, 1953

The respondent, United States of America, appearing specially herein for the purpose of filing these exceptive allegations and not otherwise, respectfully excepts to the libel for want of jurisdiction of this Honorable Court of the person of the respondent and of the subject matter of this proceeding and alleges upon information and belief as follows:

First: On May 4, 1952, the date upon which the libelant claim (sic) to have been injured, he was a deck hand a member of the crew of the Steamer ILLINOIS, a public vessel of the United States, publicly operated and employed as a merchant vessel.

Second: At the time of the alleged injury to the libelant he was a civilian employee of the United States through

the Department of Commerce, Inland Waterways Corporation, a corporation created pursuant to Title 49 United States Code, Section 151 *et seq.*

Third: As such a civilian employee, the libelant was entitled to the benefits of the Federal Employees' Compensation Act, 5 United States Code, Section 751 *et seq.*, and said remedy was exclusive of all others.

[fol. 12] Wherefore, the respondent prays that the libel herein be dismissed, the proceeding being a suit against it without its consent, not within the scope of the Public Vessels Act, 46 United States Code, Sections 781 to 790 inclusive, nor within the scope of the Suits in Admiralty Act, 46 United States Code, Sections 741 to 752 inclusive, nor sanctioned by any other statute or provision of law.

J. Edward Lumbard, United States Attorney, Proctor for Respondent, Office & P. O. Address: Room 1003, U. S. Court House, Foley Square, New York 7, N. Y.

(Sworn to September 28, 1953.)

[fol. 13]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OPINION OF KAUFMAN, D.J.—April 15, 1955

Appearances:

Jacob Rassner, Proctor for Libelant. Harvey Goldstein of Counsel.

J. Edward Lumbard, United States Attorney, Proctor for Respondent, Appearing Specially. Leavenworth Colby, Special Assistant to The Attorney General. Benjamin H. Berman, Attorney, Department of Justice. of Counsel.

IRVING R. KAUFMAN, D.J.

Libelant sues in admiralty for damages for personal injuries allegedly based upon negligence and unseaworthi-

ness and for maintenance and cure. He was employed as a seaman by the United States, through the Inland Waterways Corporation, a wholly owned instrumentality of the United States. The accident took place aboard the ILLINOIS, a ship which was owned, manned and operated by the Inland Waterways Corporation and was employed as a merchant vessel.

[fol. 14] The exceptive allegations now before the Court squarely raise the issue whether libelant's remedy under the Federal Employees Compensation Act, 5 U. S. C. 751 *et seq.*, bars this suit under the Suits in Admiralty Act, 46 U. S. C. 741 *et seq.*

This Court does not write upon a clean slate. In *Johansen* v. *United States*, 343 U. S. 427 (1952) the Supreme Court held that a civilian seaman employee of the United States injured on a "public vessel" was barred from suing the Government under the Public Vessels Act, 46 U. S. Sec. 781 *et seq.*, because his sole and exclusive remedy was under the Federal Employees Compensation Act. On the precise issue presented in this case, the Eighth Circuit, in *Inland Waterways Corp.* v. *Doyle*, 204 F. 2d 874 (1953) held that a civilian seaman employee of the United States injured on a "merchant vessel" could sue under the Suits in Admiralty Act, the Compensation Act being merely an alternative remedy. This holding was expressly followed in *Cowan* v. *Inland Waterways Corp.*, 121 F. Supp. 683 (E. D. Ill. 1954). Judge Dimock of this District in an unreported case, *Patterson* v. *United States* (Ad. 151-223; decided February 2, 1955) held *contra* to *Doyle* and *Cowan*.

The Eighth Circuit felt impelled to its conclusion by certain language in the *Johansen* case. Although the Court of Appeals found some language in *Johansen* which supported the view that the Compensation Act was a bar to a remedy under the Suits in Admiralty Act, it was convinced that other language in *Johansen* dictated its contrary holding. It was with reluctance that the Eighth Circuit held as it did, for the Court said:

> "We have no hesitation in saying that we can conceive of no sound reason for making a distinction with respect to remedies between civilian seamen

employed by the United States on its 'public vessels' and those employed on its 'merchant vessel' * * * We [fol. 15] think that the remedy provided by the Federal Employees' Compensation Act should be exclusive. Our sole concern, however, is with what the law is and not with what it should be" (p. 878).

Actually, in *Johansen*, Justice Reed stated that the Court would review and hold on only the "public vessel" issue, leaving open the "merchant vessel" question.[1] The language in the opinion cuts both ways on the instant question and renders it ambiguous or, at least, "leaves the issue open."[2]

The language of both the Public Vessels Act and the Suits in Admiralty Act *prima facie* would seem to authorize suit by a seaman-employee of the United States. The language and legislative purpose of both Acts are similar. The Suits in Admiralty Act, passed in 1920, waived the Government's sovereign immunity with respect to merchant vessels. In 1925 the Government extended its waiver, in the Public Vessels Act, to all of its vessels by including public vessels within the sphere of liability.
[fol. 16] I can discern no rational basis for granting an election of remedies to a civilian employee of the United

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[1] 343 U. S. at 429, n. 1.: "Since petitioner does not specify the second holding [below] as error, we review only the first * * *" The first holding below left open the "merchant vessel" issue; the second holding relating to a "public vessel".

[2] There is no need to quote the conflicting language in *Johansen*. The Eighth Circuit in *Doyle* devoted two pages of its opinion to this task. Suffice to say that the consistent language dichotomy between "merchant seaman" and "public vessel seamen" present in *Johansen* convinced the *Doyle* Court that an operative distinction was being made by the Supreme Court. However, the issue here is whether those "merchant seamen" *who are also employees of the United States* are to be treated on a parity with "public vessel" seamen who are always employees of the United States or on a parity with those "merchant seamen" who are not Government employees. The dichotomy employed in *Johansen* does not appear to be aimed at the tri-partite classification involved in the instant case.

States aboard a merchant vessel when his counterpart aboard a public vessel is denied such an election.[3]
[fol. 17] The exceptive allegations are sustained and the libel dismissed. So ordered.

Dated: New York, N. Y., April 15, 1955.

Irving R. Kaufman, U. S. D. J.

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[3] The only basis upon which a distinction of some substance could be drawn would be predicated upon the approach the Supreme Court in *Johansen* took: exclusivity of the Compensation Act is to be presumed [because a comprehensive compensation plan is a "socially desirable rule" (343 U. S. at 439)] to have been the intent of Congress unless a later remedial statute, which appears only generally to grant a right to federal employees already covered by the Compensation Act, specifically provides an election. It was clear at the time the Public Vessels Act was passed in 1925, which appeared generally to cover public-vessel seamen, that such seamen had already been given a remedy under the 1916 Compensation Act. On the other hand, at the time of the passage of the Suits in Admiralty Act in 1920, which appeared generally to grant a right to all merchant seamen, it was not clear whether any or all of such seamen were covered by the Compensation Act because of the many and varied methods employed by the United States in the operation of such merchant vessels. Some vessels were directly chartered to private operators by the United States, others were privately operated under charter from an incorporated or unincorporated instrumentality of the United States and others were operated by private agencies for one of the instrumentalities. In some instances the private entity paid the seamen; in other cases the United States or one of its instrumentalities paid the seamen directly or indirectly through its private agent. See *Robinson on Admiralty*, p. 248. Again, many of the charters varied as to the extent of governmental supervision over the seamen. As a result, it was often difficult to determine whether a particular merchant seaman was an "employee of the United States" under the 1916 Act [39 Stat. 750; 39 Stat. 742]. See *Johansen* at 434-35: "Merchant seamen * * * had a right to libel the United States pursuant to the Suits in Admiralty Act of 1920, *but whether they were entitled to the benefits of the Compensation Act was doubtful*," citing: Comptroller General's Decision A-31684, Sept. 10, 1930; 34 Op. Atty. Gen. 363; *Johnson* v. *Fleet Corp.*, 280 U. S. 320. It may reasonably be concluded, *if this approach is accepted*, that if Congress itself at the time the Suits in Admiralty Act was passed in 1920 (as well as the courts) was unsure of the extent to which the various classes of merchant seamen were already covered by the 1916 Compensation Act, then it cannot be presumed that it intended the Compensation Act to be exclusive. [The Compensa-

[fol. 18]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 151-223

JAMES S. PATTERSON, General Administrator for Mobile County, Alabama, as Administrator of the Estate of EDGAR A. DOODY, JR., deceased, Libelant,

against

UNITED STATES OF AMERICA, Respondent.

LIBEL—Filed July 30, 1947

To the Honorable Judges of the United States District Court for the Southern District of New York:

The libel of James S. Patterson, General Administrator for Mobile County, Alabama, as Administrator of the Estate of Edgar A. Doody, Jr., deceased, against the United States of America in an action under the Public Vessels Act, Suits in Admiralty Act, and Public Law 17, for the recovery of damages for wrongful death.

First: That prior to the commencement of this action, and on the 27th day of May, 1947, a formal claim, pursuant to Public Law No. 17—78th Congress (H. R. 133) was forwarded to the War Shipping Administration and due notice of said claim was received by War Emergency

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tion Act was subsequently amended to include for the first time or to reaffirm the past coverage of "employees of instrumentalities of the United States wholly owned by the United States" 5 U. S. C. 790]. However, this essentially historical approach is entirely unworkable if the Suits in Admiralty Act is to be placed "into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." *Feres* v. *United States*, 340 U. S. 135, 139 (1950), cited in *Johansen* at 432. In each instance, the courts would be called upon to determine whether, under the law as it existed in 1920, Congress (or the courts) considered a merchant seaman in plaintiff's position, in terms of the Government's relationship to him, to have been already covered by the 1916 Compensation Act.

Tankers, Inc., agent and operator of the S.S. Hanging Rock. More than sixty (60) days have elapsed since the filing of said claim, and said claim is deemed to have been administratively disallowed.

[fol. 19] Second: That at all the times hereinafter mentioned, the respondent was and is a corporation sovereign, which has by law consented to be sued.

Third: That prior to the commencement of this action, James S. Patterson, General Administrator for Mobile County, Alabama, was duly appointed Administrator of the Estate of Edgar A. Doody, Jr., deceased.

Fourth: That upon information and belief, that at all the times hereinafter mentioned, the respondent was the owner of a certain steamship or vessel known as the S.S. Hanging Rock.

Fifth: That at all the times hereinafter mentioned, the respondent managed, operated and controlled the aforementioned vessel.

Sixth: That at all the times hereinafter mentioned, the decedent, Edgar A. Doody, Jr., was employed aboard the aforementioned vessel in the capacity of seaman.

Seventh: That at all the times hereinafter mentioned, all the officers and crew of the aforementioned vessel were in the employ of the respondent.

Eighth: That the Admiralty Division of the United States District Court for the Southern District of New York has jurisdiction of the subject matter as well as the parties to the action.

Ninth: That this Court has jurisdiction of the above entitled action by reason of the Public Vessels Act.

Tenth: That this Court has jurisdiction of the above entitled action by reason of the Suits in Admiralty Act.

[fol. 20] Eleventh: That this Court has jurisdiction of the above entitled action by reason of Public Law 17.

Twelfth: That at all the times hereinafter mentioned, there was in force and effect a law commonly known as the Jones Act, to the benefit of which the libelant is entitled.

Thirteenth: That at all the times hereinafter mentioned, the libelant was and still is a resident of the State of Alabama.

Fourteenth: That at the time of the filing of this libel, the aforementioned vessel was within the jurisdiction of this Court.

Fifteenth: That on or about the 1st day of August, 1945, the libelant's decedent suffered injuries to his person which resulted in his death.

Sixteenth: That on or about the 1st day of August, 1945, while the decedent was properly, carefully, prudently engaged in the performance of his duties aboard the vessel aforementioned, he was suddenly and without any notice or warning caused to suffer injuries and death, by reason of the carelessness, recklessness and negligence of the respondent, its agents, servants and employees, in failing, neglecting and omitting to have its vessel maintained in a reasonably safe state of repairs and in a seaworthy condition; in failing to provide the decedent with a reasonably safe place wherein to work and in addition that an explosion occurred aboard the vessel aforementioned as a result of defective and dangerous machinery, gear and equipment aboard the vessel, all of which resulted in the decedent suffering injuries to his head, including a fracture of the skull and other injuries, resulting in conscious pain and suffering and subsequent death, and the respondent was otherwise careless, reckless and negligent in the premises.

[fol. 21] Seventeenth: That as a result of the accident aforementioned, the decedent suffered conscious pain, mental anguish and physical suffering from the time he suffered his injuries up to the time of his death.

Eighteenth: That the decedent died leaving him surviving his widow, Margie D. Doody Ellett, and an infant daughter, Charlotte Ann Doody, on whose behalf this action is being brought.

Nineteenth: That by reason of the foregoing, the Estate, heirs at law and next of kin of Edgar A. Doody,

Jr., sustained damages in the sum of Seventy-five Thousand ($75,000.00) Dollars.

Twentieth: That all and singular the foregoing matters are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court, and that the respondent be required to answer upon oath, all and singular the matters aforesaid, and that this Honorable Court may be pleased to decree payment of your libelant's claim.

Wherefore, libelant prays that the respondent be required to appear and answer all and singular the matters aforesaid and that this Honorable Court may be pleased to decree payment of your libelant's claim for damages in the sum of Seventy-five Thousand ($75,000.00) Dollars, together with the costs and disbursements of this action, and that libelant may have such other and further relief as to this Court may seem just and proper.

Jacob Rassner, Proctor for Libelant, Office & P. O. Address, 220 Broadway, Borough of Manhattan, City of New York.

(Verified July 28, 1947.)

[fol. 22]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANSWER—Filed January 21, 1948

To the Honorable Judges of the United States District Court for the Southern District of New York:

The answer of the respondent, United States of America, to the libel of James S. Patterson, General Administrator for Mobile County, Alabama, as Administrator of the Estate of Edgar A. Doody, Jr., deceased, in an alleged cause of action under the Suits in Admiralty Act of 1920, the Public Vessels Act, and Public Law 17, alleges, upon information and belief, and shows to this Honorable Court as follows:

First: Respondent denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Article "First" of said libel.

Second: Respondent admits that it is a sovereign power which has by law consented to be sued, but only in accordance with the statutes enacted for that purpose, and, except as expressly admitted herein, denies each and every allegation contained in Article "Second" of said libel.

Third: Respondent denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Article "Third" of said libel.

Fourth: Respondent admits each and every allegation contained in Article "Fourth" of said libel.

Fifth: Respondent admits each and every allegation contained in Article "Fifth" of said libel.

Sixth: Respondent denies each and every allegation contained in Article "Sixth" of said libel.

[fol. 23] Seventh: Respondent admits each and every allegation contained in Article "Seventh" of said libel.

Eighth: Respondent denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Article "Eighth" of said libel.

Ninth: Respondent denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Article "Ninth" of said libel.

Tenth: Respondent denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Article "Tenth" of said libel.

Eleventh: Respondent denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Article "Eleventh" of said libel.

Twelfth: Respondent admits that, at the times mentioned in the libel, there was in force and effect a law commonly known as the Jones Act, and, except as expressly admitted herein, denies each and every allegation contained in Article "Twelfth" of said libel.

Thirteenth: Respondent denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Article "Thirteenth" of said libel.

Fourteenth: Respondent denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Article "Fourteenth" of said libel.

Fifteenth: Respondent denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Article "Fifteenth" of said libel.

[fol. 24] Sixteenth: Respondent denies each and every allegation contained in Article "Sixteenth" of said libel.

Seventeenth: Respondent denies each and every allegation contained in Article "Seventeenth" of said libel.

Eighteenth: Respondent denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Article "Eighteenth" of said libel.

Nineteenth: Respondent denies each and every allegation contained in Article "Nineteenth" of said libel.

Twentieth: Respondent admits that all and singular the foregoing matters are within the Admiralty and Maritime jurisdiction of the United States of America and of this Honorable Court, and, except as expressly admitted herein, denies each and every allegation contained in Article "Twentieth" of said libel.

Further Answering, the Respondent Alleges:

Twenty-first: Any injuries sustained by the deceased, as alleged in the libel, were due solely to and caused by the deceased's own negligence and not caused by or contributed to in any manner or by any negligence on the part of the respondent.

Twenty-second: Deceased's duties had certain risks incident thereto which were obvious and well known to the deceased at the time he entered upon his employment, and if the deceased sustained any injuries, as alleged in the libel, such injuries arose out of and were incident to said risks, all of which were taken and assumed by the deceased at the time he entered upon such employment and during the continuance thereof.

[fol. 25] Twenty-third: That, heretofore, and prior to the filing of the libel herein, Margie D. Doody, the widow of the

deceased, filed, on behalf of herself and her minor daughter, Charlotte Ann Doody, a claim with the Governor of the Panama Canal, who administers the United States Employees Compensation Act in the Canal Zone, pursuant to the provisions of Title 5 U. S. C. A. Section 793. That such proceedings were had thereon that thereafter she was allowed and accepted compensation in the total sum of $1,852.38, as a final award, approved on August 21, 1945, by the Governor of the Panama Canal. That by applying for and accepting compensation, under the United States Employees' Compensation Act, she elected her remedy and surrendered any right of action she may have had against the United States of America under either the Suits in Admiralty Act, 46 U. S. C. A. Section 741, et seq.; the Public Vessels Act, 46 U. S. C. A. Section 781, et seq., or Public Law 17, U. S. C. A. Appendix Section 1291.

Wherefore, respondent prays that the libel herein be dismissed with costs.

John F. X. McGohey, U. S. Attorney for the Southern District of New York, Proctor for Respondent.

Messrs. Dorsey & Adams, Of Counsel to the Proctor for Respondent, Office & P. O. Address, 44 Wall Street, New York 5, N. Y.

(Sworn to on January 19, 1948.)

[fol. 26]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RESPONDENT'S EXCEPTIVE ALLEGATIONS—
Filed October 11, 1954

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The respondent, appearing specially, for its exceptive allegations, respectfully shows:

1. At all times set forth in the libel, libelant's decedent, Edgar A. Doody, Jr., was a machinist, Mechanical Division, The Panama Canal, and a civil service shore employee of

the United States through the mechanical division of the Panama Canal, an unincorporated agency of the United States.

2. At all times set forth in the libel, the Oil Tanker SS Hanging Rock, referred to in article Fourth of the libel, was a public vessel of the United States, publicly owned and publicly operated by the War Shipping Administration and employed as a merchant vessel.

3. Upon information and belief, on or about August 1, 1945, libelant's decedent was fatally injured while in the actual performance of his duties at about 1:20 a. m. on that date, while engaged in checking the speed of a boiler feed pump turbine aboard the SS Hanging Rock and died late the same day at Gorgas Hospital Canal Zone, as a result of his injuries.

4. Thereafter, pursuant to the provisions of the Federal Employees' Compensation Act, 5 U. S. C. A., 751 [fol. 27] et seq., an award of compensation was duly made and entered on August 21, 1945, directing payment from the Employees' Compensation Fund of $61.25 per month to Margie D. Doody, the widow of Edgar A. Doody, Jr., and $17.50 to Margie D. Doody, as guardian of Charlotte A. Doody, the minor daughter of libelant's decedent.

5. Pursuant to and in accordance with the terms of the compensation order awarding compensation on account of the death of libelant's decedent, payments referred to in paragraph 4 hereof, were duly made to Margie D. Doody until her remarriage in January of 1947 and said payments were accepted and retained.

6. Pursuant to and in accordance with the terms of the compensation order awarding compensation on account of the death of libelant's decedent, payments referred to in paragraph 4 hereof, were duly made to Margie D. Doody, as guardian of Charlotte A. Doody, and said payments have been accepted and retained.

7. By reason of the premises, the libel fails to state a cause of action within the jurisdiction of this Honorable Court for the reason that the sole and exclusive remedy

for the death of libelant's decedent lies under the Federal Employees' Compensation Act, as amended, 5 U. S. C. 751 et seq.

Wherefore, respondent prays that the libel herein be dismissed with costs.

J. Edward Lumbard, United States Attorney, Proctor for Respondent Appearing Specially, Office & P. O. Address, 607 U. S. Court House, Foley Square, New York 7, N. Y.

[fol. 28]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OPINION OF DIMOCK, D. J.—Filed February 2, 1955

Appearances:

Jacob Rassner, Esq., Proctor for Libelant, 15 Park Row, New York 38, N. Y., Harvey Goldstein, Esq., of Counsel.

Honorable J. Edward Lumbard, United States Attorney, Proctor for Respondent, Appearing Specially, 607 U. S. Court House, Foley Square, New York 7, N. Y., Leavenworth Colby, Esq., Special Assistant to the Attorney General, Benjamin H. Berman, Esq., Attorney, Department of Justice, of Counsel.

DIMOCK, D. J.

Libelant, as administrator of the estate of Edgar A. Doody, Jr., deceased, sues in admiralty under the Suits in Admiralty Act as amended and supplemented, 46 U. S. C. 741 et seq., to recover damages for the intestate's death. It is alleged that he was employed on board the government owned vessel SS Hanging Rock and that his death resulted from the negligence and unseaworthiness of the ship.

The Government has filed exceptive allegations raising the point that libelant has a remedy under the Federal Employees' Compensation Act, as amended, 5 U. S. C. § 751 et seq., and that that remedy is exclusive.

[fol. 29] The parties agree that the SS Hanging Rock was owned and operated by the Government through the War Shipping Administration. This might be significant as indicating that the decedent had no remedy under the Federal Employees' Compensation Act since the Clarification Act, 50 U. S. C. App. § 1291, provides that members of crews employed on vessels "as employees of the United States through the War Shipping Administration" shall "not be considered as employees of the United States for the purposes of the United States Employees' Compensation Act, as amended". Nowhere, however, is there any indication that libelant's intestate was employed by the Government through the War Shipping Administration. Indeed the Government alleges in its exceptive allegations without contradiction that decedent was a civil service employee of the United States through the mechanical division of the Panama Canal, an unincorporated agency of the United States. Since it is thus not even contended that decedent was employed through the War Shipping Administration it cannot be said that he is by the terms of the Clarification Act excluded from the benefits of the Federal Employees' Compensation Act. I therefore agree with the Government that libelant has a remedy under the Federal Employees' Compensation Act.

As authority on its position that the remedy is exclusive, the Government cites Johansen v. United States, 343 U. S. 427, where suit was brought for personal injuries under the Public Vessels Act, 46 U. S. C. § 781 et seq., and the Supreme Court held the Federal Employees' Compensation Act exclusive. The Public Vessels Act provides that a libel in personam may be brought against the United States for damages caused by "a public vessel of the United States", 46 U. S. C. §781. The suits in Admiralty Act provides that in cases where a proceeding in admiralty could be brought against a vessel owned by the United [fol. 30] States if the vessel had been privately owned a libel in personam may be brought against the United States provided that such vessel is employed as "a merchant vessel", 46 U. S. C. § 742.

Libelant points to a statement in the exceptive allegations that the Hanging Rock was a merchant vessel. If that is so, but for any exclusive effect of the Federal Employees' Compensation Act, libelant's rights would be gov-

erned by the Suits in Admiralty Act, Geo. W. Rogers Const. Corp. v. United States, D. C. N. D. N. Y., 118 F. Supp. 927, 934. Libelant thus attempts to distinguish Johansen v. United States, 343 U. S. 427, supra, where the libelant's rights, but for the exclusive effect of the Federal Employees' Compensation Act, would have been governed by the Public Vessels Act. In this attempt libelant is supported by Inland Waterways Corporation v. Doyle, 8 Cir., 204 F. 2d 874, which held that the remedy under the Federal Employees' Compensation Act was not exclusive of a remedy under the Suits in Admiralty Act.

The court in the Inland Waterways case admitted, p. 878, that it "could conceive of no sound reason for making a distinction with respect to remedies between civilian seamen employed by the United States upon its 'public vessels' and those employed on its 'merchant vessels' ". Nevertheless the court felt that the opinion in the Johansen case indicated that the remedy under the Federal Employees' Compensation Act was not exclusive of the remedy under the Suits in Admiralty Act.

Libelant has not suggested any sound reason for making a distinction with respect to remedies on the one hand available under the Public Vessels Act because public vessels are involved and on the other hand available under the Suits in Admiralty Act involving merchant vessels. I therefore agree with the Inland Waterways opinion that there is no sound reason for such a distinction. I disagree, [fol. 31] however, with the Eighth Circuit's interpretation of the Johansen opinion as holding that the remedy under the Federal Employees' Compensation Act was not exclusive of the remedy under the Suits in Admiralty Act. Indeed, while the Supreme Court ostensibly refused to pass upon that question (p. 429 n. 1), other language in the opinion indicates that it viewed the Federal Employees' Compensation Act remedy as exclusive of that under the Suits in Admiralty Act. On page 439 the court said, "See also United States v. Marine, 155 F. 2d 456, a case allowing recovery to a civilian employee of the Government under the Suits in Admiralty Act, and Johnson v. United States, 186 F. 2d 120, which allowed a recovery under the Public Vessels Act to a civilian seaman on a public vessel. The

opinions below in the cases we are considering take the opposite and, we think, the better view."

While all might not agree with the Supreme Court that the lower courts in the Johansen case had expressed a view on the question of the exclusiveness of the Federal Employees' Compensation Act remedy with reference to the Suits in Admiralty Act remedy, no one after reading the above quoted language can gainsay that the Supreme Court said that it regarded the denial of recovery under the Suits in Admiralty Act as the better view.

The same considerations apply whether the ship is a public ship or a merchant ship and I hold that the remedy under the Federal Employees' Compensation Act is exclusive of the remedy under the Suits in Admiralty Act.

The exceptive allegations are sustained and the libel dismissed.

Dated: February 2, 1955.

E. J. Dimock, United States District Judge.

[fol. 32]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORDER SUSTAINING EXCEPTIVE ALLEGATIONS AND DISMISSING LIBEL—February 9, 1955

The respondent, appearing specially, having filed exceptive allegations herein and said exceptive allegations having been duly brought on for hearing before this Court on December 2, 1954.

Now, on reading the libel and respondent's exceptive allegations and after hearing J. Edward Lumbard, United States Attorney (Leavenworth Colby, Esq., Special Assistant to the Attorney General, and Benjamin H. Berman, Esq., Attorney, Department of Justice, of counsel), proctor for the respondent, in support of said exceptive allegations and Jacob Rassner, Esq. (Harvey Goldstein, Esq., of counsel), proctor for the libelant, in opposition thereto, and upon filing the opinion of the Court, it is

On motion of J. Edward Lumbard, United States Attorney, proctor for the respondent, appearing specially,

Ordered that the respondent's exceptive allegations be and the same hereby are sustained and the libel herein be and the same hereby is dismissed.

Dated: New York, N. Y., February 9, 1955.

E. J. Dimock, United States District Judge.

[fol. 33]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LIBEL (DUNCAN CASE)—Filed June 29, 1953

To the Honorable Judges of the United States District Court for the Southern District of New York

In Admiralty—Ad. 178-291

The libel of Sterling Eugene Duncan against the United States of America, in an action under the provisions of the Suits in Admiralty Act of 1920, for the recovery of damages for injuries sustained and for maintenance and cure, respectfully alleges, on information and belief:

For a First Cause of Action

First: At all the times hereinafter mentioned, the towboat "Baton Rouge" was and still is employed as a tugboat.

Second: The respondent, the United States of America, at all the times hereinafter mentioned, through the Inland Waterways Corporation, a corporation whose stock is wholly owned by the United States of America, owned, manned, operated, managed and controlled the towboat "Baton Rouge".

Third: The libelant was employed aboard the "Baton Rouge" and joined same at a rating of fireman, at a regular monthly wage of $270.00, together with bonus, overtime, and maintenance, all under the customary ship's articles, and, at all the times hereinafter mentioned, except as otherwise set forth, continued in such employment.

Fourth: It was the obligation and duty of the respondent to furnish libelant with an adequate number of officers

and co-employees; to provide libelant with a skilled, careful, and competent Master, and skilled, careful and competent [fol. 34] officers and co-employees; to furnish libelant with a safe place in which to do his work; to supply him with suitable and safe means, materials, and appliances in and for the performance of his work; to maintain the same in proper condition for the proper performance of the said work; to promulgate and enforce proper rules in relation to the foregoing and to inspect the aforesaid materials, appliances, and means; to provide libelant with a safe and seaworthy vessel; and to warn the libelant of the dangers to be encountered in the performance of the said work.

Fifth: That on or about and between the 20th day of December, 1950 and the 7th day of November, 1951, while libelant was acting within the scope of his employment, and in the interests of the respondent herein, he was caused to become seriously ill, as hereinafter more fully described, all by reason of the carelessness and negligence of the respondent, its officers, agents, servants, employees, and other persons for whom the respondent was responsible, and in violation of the aforesaid duty and obligation, without any fault or negligence upon the part of the libelant herein.

Sixth: That on or about and between the 20th day of December, 1950 and the 7th day of November, 1951 and during the course of his employment as aforesaid, the libelant was compelled or required to live aboard the vessel in quarters which were defective, negligently and improperly maintained, unsafe and dangerous to his health in that the said quarters were not inhabitable and were unseaworthy; in that the said quarters were maintained and permitted and allowed by the respondent to become and remain in a damp, wet, unsafe, poorly ventilated and uninhabitable condition; that while so engaged in his duties on board the said towboat on and between said dates the respondent failed to provide the libelant with a safe place [fol. 35] wherein to work and with reasonably safe and proper equipment to work with; and by reason of other negligence in the premises, and as result of all the foregoing the libelant was thereby caused to contract or develop a

pulmonary tuberculosis disease or illness or other infection of his chest, or was caused to aggravate a previous condition of said disease or illness, dormant and non-developed amongst other things, and libelant became ill at and about his body or person with attendant injury to his nerves and nervous system, has suffered, and will suffer, great pain, agony and mental anguish, has paid out and will pay out, large sums of money for medical and surgical attention and medicines; has lost, and will lose large sums of money which he otherwise would have earned as wages and in the form of board and lodging; that he has been forced to defray the expense of his maintenance and cure; and that libelant verily believes he has been permanently injured; all to his damage in the sum of Seventy-Five Thousand ($75,000.00) Dollars.

Seventh: The "Baton Rouge" is now, or will be at the time of serving and filing this libel, or during the pendency of this action, within the territorial jurisdiction of the United States.

Eighth: This suit is brought under the provisions of the Suits in Admiralty Act and all acts and statutes supplemental thereto and amendatory thereof, and the provisions of Merchant Marine Act of 1920, commonly known as the "Jones Act", and all acts and statutes supplemental thereto and amendatory thereof.

For a Second Cause of Action

Ninth: Libelant realleges each and every allegation contained in paragraphs "First" to "Eighth", inclusive, as fully and completely as though here repleaded at length.

[fol. 36] Tenth: The aforesaid injuries were sustained in the line of his duties while actually engaged in the ship's business, without any fault or negligence on his part. The libelant sues hereunder for maintenance and cure and alleges the case amounts to Twenty-Five Thousand ($25,000.00) Dollars.

Eleventh: All and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States of America and of this Honorable Court.

Twelfth: On or about the 15th day of September, 1952, a formal claim, pursuant to Public Law 17, was forwarded to the United States Maritime Administration, Department of Commerce, Washington 25, D. C. and a copy of said claim was mailed to the Attorney-General, Washington, D. C., a copy to the United States Attorney, Federal Building, New Orleans, Louisiana and a copy to the Federal Barge Lines Inc. at 611 Gavier Street, New Orleans, Louisiana. More than sixty days have elapsed between the filing of the said claim and the filing of this libel, and the said claim is deemed to have been administratively declined.

Wherefore, the libelant prays that the respondent, the United States of America, be required to appear and answer all and singular the premises aforesaid and that libelant may have a decree for the amount of the damages, to wit: One Hundred Thousand ($100,000.00) Dollars, together with the costs and disbursements of this action.

Jacob Rassner, Proctor for Libelant, Office & P. O. Address, 15 Park Row, New York 38, New York.

S. Eldridge Sampliner, Esq., Of Counsel.

(Verified by Jacob Rassner, June 25, 1953.)

[fol. 37]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RESPONDENT'S EXCEPTIVE ALLEGATIONS—Filed April 21, 1955

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The respondent, appearing specially, for its exceptive allegations, respectfully shows:

I. At all times set forth in the libel the towboat Baton Rouge, the vessel referred to in Article Second of the libel, was a public vessel of the United States, publicly operated and employed as a merchant vessel.

2. At the time of the injury alleged in the libel, libelant, a fireman and member of the crew of the towboat Baton Rouge, was a civilian employee of the United States through the Inland Waterways Corporation, a wholly owned incorporated agency of the United States created pursuant to the provisions of Title 49 U. S. C. 151 et seq.

3. As such civilian employee, libelant was entitled to the benefits of the Federal Employees' Compensation Act, as amended, 5 U. S. C. 751 et seq.

4. By reason of the premises the libel fails to state a cause of action within the jurisdiction of this Honorable Court for the reason that the sole and exclusive remedy of the libelant lies under the Federal Employees' Compensation Act, as amended, 5 U. S. C. 751 et seq.

[fol. 38] Wherefore, respondent prays that the libel herein be dismissed with costs.

J. Edward Lumbard, United States Attorney, Proctor for Respondent Appearing Specially, Office & P. O. Address, 607 U. S. Court House, Foley Square, New York 7, N. Y.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM ENDORSED ON MOTION PAPERS

Jul 19, 1955

Exceptive allegations sustained. Submit order.

Edmund L. Palmieri, U. S. D. J.

[fol. 39]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORDER SUSTAINING EXCEPTIVE ALLEGATIONS AND DISMISSING LIBEL—July 26, 1955

The respondent, appearing specially, having filed exceptive allegations herein and said exceptive allegations having duly been brought on for hearing before this Court on July 19, 1955,

Now, on reading respondent's notice of hearing dated April 22, 1955, and libel herein and respondent's exceptive allegations and after hearing Lloyd F. MacMahon, United States Attorney (Benjamin H. Berman, Esq., Attorney, Department of Justice, of Counsel), proctor for the respondent, appearing specially, and Jacob Rassner (Harvey Goldstein, Esq., of Counsel), proctor for the libelant, it is

On motion of Lloyd F. MacMahon, United States Attorney, proctor for the respondent herein,

Ordered that respondent's exceptive allegations herein be and the same hereby are sustained; and it is

Further Ordered that the libel herein be and the same hereby is dismissed.

Dated: New York, N. Y., July 26, 1955.

Edmund L. Palmieri, United States District Judge.

[fol. 40]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LIBEL (HAYS CASE)—Filed December 21, 1953

To the Honorable Judges of the United States District Court for the Southern District of New York:

In Admiralty—Ad. 180-226

The libel of Melvin A. Hays against the United States of America, in an action under the provisions of the Suits in Admiralty Act of 1920, for the recovery of damages for injuries sustained and for maintenance and cure, respectfully alleges, on information and belief:

For a First Cause of Action:

First: At all the times hereinafter mentioned, the steamer "Missouri" was and still is employed as a merchant vessel.

Second: The respondent, the United States of America, at all the times hereinafter mentioned, through the Inland Waterways Corporation, a corporation whose stock is wholly owned by the United States of America, owned, manned, operated, managed and controlled the steamer "Missouri".

Third: The libelant was employed aboard the "Missouri" and joined same at a rating of deck-hand, at a regular monthly wage of $275.00, together with bonus, overtime, and maintenance, all under the customary ship's articles, and, at all the times hereinafter mentioned, except as otherwise set forth, continued in such employment.

Fourth: It was the obligation and duty of the respondent to furnish libelant with an adequate number of officers and co-employees; to provide libelant with a skilled, careful and competent Master, and skilled, careful and competent [fol. 41] officers and co-employees; to furnish libelant with a safe place in which to do his work; to supply him with suitable and safe means, materials and appliances in and for the performance of his work; to maintain the same in proper

condition for the proper performance of the said work; to promulgate and enforce proper rules in relation to the foregoing and to inspect the aforesaid materials, appliances and means; to provide libelant with a safe and seaworthy vessel; and to warn the libelant of the dangers to be encountered in the performance of the said work.

Fifth: That on or about and between the month of October, 1952 through on or about November, 1952, and from on or about January, 1953 through on or about February, 1953, while libelant was acting within the scope of his employment, and in the interests of the respondent herein, he was caused to become seriously ill, as hereinafter more fully described, all by reason of the carelessness and negligence of the respondent, its officers, agents, servants, employees and other persons for whom the respondent was responsible, and in violation of the aforesaid duty and obligation, without any fault or negligence upon the part of the libelant herein.

Sixth: That on or about and between the month of October, 1952 through on or about November, 1952, and from on or about January, 1953, through on or about February, 1953, and during the course of his employment as aforesaid, libelant was compelled or required to live aboard the said vessel in quarters which were unsafe, defective, negligently and improperly maintained and dangerous to his health; in that the said quarters were not inhabitable and were unseaworthy; in that the negligent and improperly maintained condition of these quarters and the surrounding area thereof caused the said quarters to be and constantly remain in a damp, wet, unsafe, poorly ventilated [fol. 42] and poor condition; and by reason of other negligence and carelessness in the premises, libelant was thereby caused to contract or develop a pulmonary tuberculosis disease or illness, or other illness, or was caused to aggravate a previous condition of said disease or illness dormant and non-disabling, amongst other things and libelant became ill at or about his body and person with attendant damage to his nerves and nervous system, has suffered and will suffer great pain, agony and mental anguish, and has paid out and will pay out, large sums of

money for medical and surgical attention and medicines; has lost and will lose large sums of money which he otherwise would have earned as wages and in the form of board and lodging; that he has been forced to defray the expense of his maintenance and cure; that libelant verily believes he has been permanently injured, all to his damage in the sum of One Hundred Thousand ($100,000.00) Dollars.

Seventh: The "Missouri" is now, or will be at the time of serving and filing this libel, or during the pendency of this action, within the territorial jurisdiction of the United States.

Eighth: This suit is brought under the provisions of the Suits in Admiralty Act and all acts and statutes supplemental thereto and amendatory thereof, and the provisions of Merchant Marine Act of 1920, commonly known as the "Jones Act", and all acts and statutes supplemental thereto and amendatory thereof.

For a Second Cause of Action:

Ninth: Libelant realleges each and every allegation contained in paragraphs "First", "Second", "Third", "Fourth" and "Seventh" as fully and completely as though here repleaded at length.

[fol. 43] Tenth: It was the absolute and non-delegatable duty of the respondent to furnish libelant with a safe and seaworthy vessel, which duty respondent failed to carry out, thereby causing libelant to sustain injuries hereinafter described, to his damage in the sum of One Hundred Thousand ($100,000.00) Dollars.

Eleventh: That on or about and between the month of October, 1952 through on or about November, 1952, and from on or about January, 1953 through on or about February, 1953, as a result of the failure of the respondent, its officers, servants, agents and/or employees to provide the libelant with a safe and seaworthy vessel and safe and seaworthy appurtenances, the libelant was caused to sustain a severe, painful and permanent illness to his person.

Twelfth: That by reason of the foregoing, libelant was caused to contract and develop a pulmonary tuberculosis

disease or illness, or other illness, or was caused to reactivate or aggravate a previous condition of said disease or illness dormant and non-disabling, and was incapacitated from attending to his usual duties or vocation, resulting in his suffering a loss of earnings thereby, and libelant may be required to incur obligation for medical and surgical aid and attendance and nursing care, and libelant was otherwise injured.

Thirteenth: This suit is brought under the provisions of the Suits in Admiralty Act and all acts and statutes supplemental thereto and amendatory thereof.

For a Third Cause of Action.

Fourteenth: At all the times hereinafter mentioned, the steamer "Illinois" was and still is employed as a merchant vessel.

[fol. 44] Fifteenth: The respondent, the United States of America, at all the times hereinafter mentioned, through the Inland Waterways Corporation, a corporation whose stock is wholly owned by the United States of America, owned, manned, operated, managed and controlled the steamer "Illinois".

Sixteenth: The libelant was employed aboard the "Illinois" and joined same at a rating of deck hand, at a regular monthly wage of $275.00, together with bonus, overtime, and maintenance, all under the customary ship's articles, and, at all the times hereinafter mentioned, except as otherwise set forth, continued in such employment.

Seventeenth: It was the obligation and duty of the respondent to furnish libelant with an adequate number of officers and co-employees; to provide libelant with a skilled, careful and competent Master, and skilled, careful and competent officers and co-employees; to furnish libelant with a safe place in which to do his work; to supply him with suitable and safe means, materials and appliances in and for the performance of his work; to maintain the same in proper condition for the proper performance of the said work; to promulgate and enforce proper rules

in relation to the foregoing and to inspect the aforesaid materials, appliances and means; to provide libelant with a safe and seaworthy vessel; and to warn the libelant of the dangers to be encountered in the performance of the said work.

Eighteenth: That on or about and between the months of December, 1952 and January, 1953, while libelant was acting within the scope of his employment and in the interests of the respondent herein, he was caused to become seriously ill, as hereinafter more fully described, all by reason of the carelessness and negligence of the respondent, its officers, agents, servants, employees and other persons for whom the respondent was responsible, and in [fol. 45] violation of the aforesaid duty and obligation, without any fault or negligence upon the part of the libelant herein.

Nineteenth: That on or about and between the months of December, 1952 and January, 1953, and during the course of his employment as aforesaid, libelant was compelled or required to live aboard the said vessel in quarters which were unsafe, defective, negligently and improperly maintained and dangerous to his health; in that the said quarters were not inhabitable and were unseaworthy; in that the negligent and improperly maintained condition of these quarters and the surrounding area thereof caused the said quarters to be and constantly remain in a damp, wet, unsafe, poorly ventilated and poor condition; and by reason of other negligence and carelessness in the premises, libelant was thereby caused to contract or develop a pulmonary tuberculosis disease or illness, or other illness, or was caused to aggravate a previous condition of said illness or disease dormant and non-disabling, amongst other things and libelant became ill at or about his body and person with attendant damage to his nerves and nervous system, has suffered and will suffer great pain, agony and mental anguish, and has paid out and will pay out, large sums of money for medical and surgical attention and medicines; has lost and will lose large sums of money which he otherwise would have earned as wages and in the form of board and lodging; that he has been forced

to defray the expense of his maintenance and cure; that plaintiff verily believes he has been permanently injured, all to his damage in the sum of One Hundred Thousand ($100,000.00) Dollars.

Twentieth: The "Illinois" is now, or will be at the time of serving and filing this libel, or during the pendency of this action, within the territorial jurisdiction of the United States.

[fol. 46] Twenty-first: This suit is brought under the provisions of the Suits in Admiralty Act and all acts and statutes supplemental thereto and amendatory thereof, and the provisions of Merchant Marine Act of 1920, commonly known as the "Jones Act", and all acts and statutes supplemental thereto and amendatory thereof.

For a Fourth Cause of Action.

Twenty-second: Libelant realleges each and every allegation contained in paragraphs "Fourteenth", "Fifteenth", "Sixteenth", "Seventeenth" and "Twentieth" as fully and completely as though here repleaded at length.

Twenty-third: It was the absolute and non-delegatable duty of the respondent to furnish libelant with a safe and seaworthy vessel, which duty respondent failed to carry out, thereby causing libelant to sustain an illness hereinafter described, to his damage in the sum of One Hundred Thousand ($100,000.00) Dollars.

Twenty-fourth: That on or about and between the months of December, 1952 and January, 1953, as a result of the failure of the respondent, its officers, servants, agents and/or employees to provide the libelant with a safe and seaworthy vessel and safe and seaworthy appurtenances, the libelant was caused to sustain severe, painful and permanent illness to his person as hereinafter set forth.

Twenty-fifth: That by reason of the foregoing, libelant was caused to contract and develop a pulmonary tuberculosis disease or illness, or other illness, or was caused to reactivate or aggravate a previous condition of said disease or illness dormant and non-disabling, and was in-

capacitated from attending to his usual duties or vocation, resulting in his suffering a loss of earnings thereby, and libelant may be required to incur obligation for medical and surgical aid and attendance and nursing care, and libelant was otherwise injured.

[fol. 47] Twenty-sixth: This suit is brought under the provisions of the Suits in Admiralty Act and all acts and statutes supplemental thereto and amendatory thereof.

For a Fifth Cause of Action.

Twenty-seventh: Libelant realleges each and every allegation contained in paragraphs "First" to "Twenty-sixth" inclusive, as fully and completely as though here repleaded at length.

Twenty-eighth: The aforesaid injuries were sustained in the line of his duties while actually engaged in the ship's business, without any fault or negligence on his part. The libelant sues hereunder for maintenance and cure and alleges the case amounts to Twenty-five Thousand ($25,000.00) Dollars.

Twenty-ninth: All and singular the premises are true and within the Admiralty and Maritime Jurisdiction of the United States of America and of this Honorable Court.

Wherefore, the libelant prays that the respondent, the United States of America, be required to appear and answer all and sigular the premises aforesaid and that libelant may have a decree for the amount of the damages to wit: One Hundred and Twenty-five Thousand ($125,000.00) Dollars, together with the costs and disbursements of this action.

Herman N. Rabson, Proctor for Libelant, Office & P. O. Address, 15 Park Row, New York 38, New York.

S. Eldridge Sampliner, Esq., of Counsel.

(Verified by Herman N. Rabson, December 21, 1953.)

[fol. 48]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANSWER—File May 4, 1954

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The answer of the respondent to the libel of Melvin A. Hays, alleges upon information and belief:

As to the First Cause of Action:

First: It denies the truth of the allegations of Article First.

Second: It admits that, at the times of the events mentioned in the libel, Inland Waterways Corporation was a corporation whose stock was wholly owned by it and that it, through Inland Waterways Corporation, owned, manned, operated, managed and controlled the Steamer Missouri. Except as so admitted, it denies the truth of the remaining allegations of Article Second.

Third: It admits that the libelant was at one time employed aboard the steamer Missouri as an inexperienced deck hand at a daily wage of $7.44. Except as so admitted, it denies the truth of the remaining allegations of Article Third.

Fourth: It denies the truth of the allegations of Article Fourth.

[fol. 49] Fifth: It denies the truth of the allegations of Article Fifth.

Sixth: It denies the truth of the allegations of Article Sixth.

Seventh: It denies the truth of the allegations of Article Seventh.

Eighth: It is without knowledge sufficient to form a belief as to the truth of the allegations of Article Eighth. It denies that the libelant is entitled to maintain this suit

under the provisions of the Suits in Admiralty Act and or the Jones Act, so-called.

As to the Second Cause of Action:

Ninth: The respondent repeats and realleges each and every allegation in paragraphs "First", "Second", "Third", "Fourth" and "Seventh" with the same force and effect as if herein set forth at length and in addition thereto alleges:

Tenth: It denies the truth of the allegations of Article Tenth.

Eleventh: It denies the truth of the allegations of Article Eleventh.

Twelfth: It denies the truth of the allegations of Article Twelfth.

Thirteenth: It is without knowledge sufficient to form a belief as to the truth of the allegations of Article Thirteenth. It denies that the libelant is entitled to maintain this suit under the provisions of the Suits in Admiralty Act.

As to the Third Cause of Action:

Fourteenth: It denies the truth of the allegations of Article Fourteenth.

[fol. 50] Fifteenth: It admits that, at the times of the events mentioned in the libel, Inland Waterways Corporation was a corporation whose stock was wholly owned by it and that it, through Inland Waterways Corporation, owned, manned, operated, managed and controlled the steamer Illinois. Except as so admitted, it denies the truth of the remaining allegations of Article Fifteenth.

Sixteenth: It admits that the libelant was at one time employed aboard the steamer Illinois as an inexperienced deck hand at a daily wage of $7.44. Except as so admitted, it denies the truth of the remaining allegations of Article Sixteenth.

Seventeenth: It denies the truth of the allegations of Article Seventeenth.

Eighteenth: It denies the truth of the allegations of Article Eighteenth.

Nineteenth: It denies the truth of the allegations of Article Nineteenth.

Twentieth: It denies the truth of the allegations of Article Twentieth.

Twenty-first: It is without knowledge sufficient to form a belief as to the truth of the allegations of Article Twenty-first. It denies that the libelant is entitled to maintain this suit under the provisions of the Suits in Admiralty Act and or the Jones Act, so-called.

As to the Fourth Cause of Action:

Twenty-second: The respondent repeats and realleges each and every allegation in paragraph "Fourteenth", "Fifteenth", "Sixteenth", "Seventeenth" and "Twentieth" with the same force and effect as if herein set forth at length and in addition thereto alleges:

fol. 51] Twenty-third: It denies the truth of the allegations of Article Twenty-third.

Twenty-fourth: It denies the truth of the allegations of Article Twenty-fourth.

Twenty-fifth: It denies the truth of the allegations of Article Twenty-fifth.

Twenty-sixth: It is without knowledge sufficient to form a belief as to the truth of the allegations of Article Twenty-sixth. It denies that the libelant is entitled to maintain this suit under the provisions of the Suits in Admiralty Act.

As to the Fifth Cause of Action:

Twenty-seventh: The respondent repeats and realleges each and every allegation in paragraphs "First" to "Twenty-

sixth" inclusive with the same force and effect as if herein set forth at length and in addition thereto alleges:

Twenty-eighth: It denies the truth of the allegations of Article Twenty-eighth.

Twenty-ninth: It denies the truth of the allegations of Article Twenty-ninth.

Further Answering the Libel Herein,
United States of America Says:

Thirtieth: If the libelant was injured as alleged in the libel, said injuries were caused in whole or in part by his own negligence or by the negligence of persons for whose conduct this respondent is not responsible.

[fol. 52] Further Answering the Libel Herein,
United States of America Says:

Thirty-first: If the libelant was injured as described in the libel, his injuries resulted from risks and dangers which were open, obvious and apparent, which he fully understood and which he assumed when he became a member of the crews of the steamers Missouri and Illinois.

Further Answering the Libel Herein,
United States of America Says:

Thirty-second: At all of the times mentioned in the libel, the libelant was a civilian employee of the United States through the Department of Commerce, Inland Waterways Corporation, a corporation created pursuant to Title 49, United States Code, Section 151 et seq. As such a civilian employee, the libelant was entitled to the benefits of the Federal Employees' Compensation Act, 5 United States Code, Section 751 et seq., and said remedy was exclusive of all others.

Wherefore, the respondent prays that the libel herein be dismissed, the proceeding being a suit against it without its consent, not within the scope of the Public Vessels Act, 46 United States Code, Sections 781 to 790 inclusive, nor within the scope of the Suits in Admiralty Act,

46 United States Code, Sections 741 to 752 inclusive, nor sanctioned by any other statute or provision of law.

J. Edward Lumbard, United States Attorney, Proctor for Respondent, Office & P. O. Address, Room 1003, U. S. Court House, Foley Square, New York 7, N. Y.

(Verified by Howard F. Fanning, May 4, 1954.)

[fol. 53]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RESPONDENT'S EXCEPTIVE ALLEGATIONS—Filed April 29, 1955

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The respondent, for its exceptive allegations, respectfully shows:

1. At all times set forth in the libel the towboat Missouri, the vessel referred to in Article Second of the libel, was a public vessel of the United States, publicly operated and employed as a merchant vessel.

2. At the time of the injury alleged in the libel, libelant, a deckhand and member of the crew of the towboat Missouri, was a civilian employee of the United States through the Inland Waterways Corporation, a wholly owned incorporated agency of the United States, created pursuant to the provisions of Title 49 U. S. C. 151 et seq.

3. As such civilian employee, libelant was entitled to the benefits of the Federal Employees' Compensation Act, as amended, 5 U. S. C. 751 et seq.

4. By reason of the premises the libel fails to state a cause of action within the jurisdiction of this Honorable Court for the reason that the sole and exclusive remedy of the libelant lies under the Federal Employees' Compensation Act, as amended, 5 U. S. C. 751 et seq.

[fol. 54] Wherefore, respondent prays that the libel herein be dismissed with costs.

J. Edward Lumbard, United States Attorney, Proctor for Respondent, Office & P. O. Address, 607 U. S. Court House, Foley Square, New York 7, N. Y.

In the United States District Court
for the Southern District of New York

Memorandum Endorsed on Motion Papers
July 18, 1955

Respondent's exceptive allegations are sustained and the libel dismissed. See *Sullivan* v. *United States* (S. D. N. Y. 1955) 130 F. Supp. 53 and *Patterson* v. *United States* (S. D. N. Y. 1955) 129 F. Supp. 794.

Dated: July 18, 1955.

Sgd. Alexander Bicks, United States District Judge.

[fol. 55]

In United States District Court
Eastern District of New York

Albert Vallebuona, Libelant,

against

United States of America, Respondent.

Libel—Filed February 23, 1954

To the Honorable Judges of the United States District Court for the Eastern District of New York:

The libel of Albert Vallebuona, against the United States of America in an action under the Public Vessels Act, Suits in Admiralty Act.

First: That at all the times hereinafter mentioned, the respondent was and is a corporation sovereign, which has by law consented to be sued.

Second: That upon information and belief, that at all the times hereinafter mentioned, the respondent was the owner of a certain steamship or vessel known as the BC 6034.

Third: That at all the times hereinafter mentioned, the respondent managed, operated and controlled the aforementioned vessel.

Fourth: That at all the times hereinafter mentioned, the libelant, Albert Vallebuona, was employed aboard the [fol. 56] aforementioned vessel in the capacity of seaman, as deckhand.

Fifth: That at all the times hereinafter mentioned, all the officers and crew of the aforementioned vessel were in the employ of the respondent.

Sixth: That the Admiralty Division of the United States District Court for the Eastern District of New York has jurisdiction of the subject matter as well as the parties to the action.

Seventh: That this Court has jurisdiction of the above entitled action by reason of the Public Vessels Act.

Eighth: That this Court has jurisdiction of the above entitled action by reason of the Suits in Admiralty Act.

Ninth: That at all the times hereinafter mentioned, there was in force and effect a law commonly known as the Jones Act, to the benefit of which the libelant is entitled.

Tenth: That at the time of the filing of this libel, the vessel aforementioned was within or about to come within the jurisdiction of the Eastern District of New York.

Eleventh: The libelant is a resident of the Borough of Richmond, City and State of New York, and within the jurisdiction of this Honorable Court.

Twelfth: That on or about the 10th day of March, 1952, while libelant was carefully, properly and prudently aboard

the aforementioned vessel in the performance of duties therein, he was suddenly and without any notice or warning caused to be injured as a result of the respondent, its servants, agents and employees, in failing to give any or proper [fol. 57] signals to the master of the tug, so as to cause the rope which the libelant was holding to become taut and causing his left leg to be crushed up against the bit and as a result thereof, the plaintiff sustained severe, painful and permanent injuries to his leg as hereinafter more particularly described. That the respondent was further at fault in failing, neglecting and omitting to give libelant any or proper signals or warnings of their intentions of moving the tug and barge. That the respondent failed, neglected and omitted to have any or proper signals between the mate, the libelant and the employees on the tug, so that the libelant could ascertain in which direction the tug was going to proceed and the respondent was further at fault in failing, neglecting and omitting to have any or proper competent employees aboard the said vessel at the time and place heretofore mentioned constituting said vessel unseaworthy, all of which resulted in the libelant sustaining the injuries hereinafter more particularly alleged, and the respondent, its servants, agents and employees were otherwise careless, reckless and negligent in the premises without any fault or contributory negligence on the part of the libelant.

Thirteenth: That by reason of the foregoing, the libelant was caused to sustain severe, painful and permanent injuries to his person, and was incapacitated from attending to his usual duties or vocation, resulting in his suffering a loss of earnings thereby, and libelant may be required to incur obligations for medical and surgical aid and attendance and nursing care, and libelant was otherwise injured all to his damage in the sum of Three Hundred Thousand ($300,000.00) Dollars.

Fourteenth: That all and singular the foregoing matters are true and within the Admiralty and Maritime juris- [fol. 58] diction of the United States and of this Honorable Court, and that the respondent be required to answer upon oath, all and singular the matters aforesaid, and that this

Honorable Court may be pleased to decree payment of your libelant's claim.

Wherefore, libelant prays that the respondent be required to appear and answer all and singular the matters aforesaid and that this Honorable Court may be pleased to decree payment of your libelant's claim for damages in the sum of Three Hundred Thousand ($300,000.00) Dollars, together with the costs and disbursements of this action, and that libelant may have such other and further relief as to this Court may seem just and proper.

Jacob Rassner, Proctor for Libelant, Office & P. O. Address, 15 Park Row, Borough of Manhattan, City of New York.

[fol. 59]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RESPONDENT'S EXCEPTIVE ALLEGATIONS—Filed June 16, 1954

To the Honorable the Judges of the United States District Court for the Eastern District of New York:

The respondent, appearing specially, for its exceptive allegations, respectfully shows:

1. At all of the times set forth in the libel the libelant was a civilian employee of the respondent, acting by and through the Department of the Army, and assigned to the Terminal Operations Division, Harbor Craft Branch, Operations Section of the Department of the Army, at the New York Port of Embarkation, in the Borough of Brooklyn, City and State of New York.

2. At all of the times set forth in the libel, army barge BC-6034, referred to in Article Second of the libel, was a public vessel of the United States engaged in the public service.

3. Upon information and belief, heretofore on or about the 10th day of March, 1952, libelant was injured while engaged in the performance of his duties on the said army barge BC-6034.

4. Thereafter, pursuant to the provisions of the Federal Employees' Compensation Act, as amended, 5 U. S. C., Section 751 et seq., libelant filed a "Claim for Compensation on Account of Injury", with the United States Employees' Compensation Commission and the Bureau of Employees' Compensation did subsequently make and file a "Compensation Order—Award of Compensation" directing [fol. 60] payment to the libelant from the Employees' Compensation Fund of accrued compensation amounting to $126.47 for the period April 1 to April 22, 1952, inclusive, and $40.24 per week during total disability of the libelant, a copy of which order is hereto annexed, marked Exhibit A and made a part hereof.

5. Said "Compensation Order—Award of Compensation" was thereafter modified on September 15, 1953 by increasing the award to $41.69 per week for the period from July 1, 1953 to January 6, 1959 and annexed hereto, marked Exhibit B and made a part hereof, is a copy of the "Compensation Order—Modification of Award" made and filed by the Bureau of Employees' Compensation.

6. Pursuant to and in accordance with the terms of the compensation order awarding compensation to the libelant, as set forth in paragraphs 4 and 5, hereof, payments were duly made to the libelant from the Employees' Compensation Fund and libelant accepted and detained said payments.

7. By reason of the premises this Honorable Court lacks jurisdiction over the respondent and the subject matter of this suit on the ground that the sole and exclusive remedy of the libelant lies under the Federal Employees' Compensation Act, as amended, 5 U. S. C., Section 751 et seq.

Wherefore, respondent prays that the libel herein be dismissed.

Leonard P. Moore, United States Attorney, Proctor for Respondent, Appearing Specially, Office & P. O. Address, 1003 U. S. Court House, Foley Square, New York 7, N. Y.

[fol. 61]

EXHIBIT A TO RESPONDENT'S EXCEPTIVE ALLEGATIONS

COMPENSATION ORDER AWARD OF COMPENSATION

U. S. DEPARTMENT OF LABOR

BUREAU OF EMPLOYEES' COMPENSATION

Form CO-4
(Rev. Jan. 1953)

Case No. X-721293

In the matter of the claim for compensation under the Federal Employees' Compensation Act of

ALBERT J. VALLEBUONA,

Claimant,

Employed by:

NEW YORK PORT OF EMBARKATION, BROOKLYN, N. Y.

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and after due consideration of such claim and reports of record, the Bureau makes the following:

FINDINGS OF FACT

That on March 10, 1952 the claimant above-named while in the employ of the employing establishment above-named sustained personal injury in the performance of duty which resulted in amputation of left foot and ankle.

That timely notice of injury and claim for compensation were respectively given and filed;

That the monthly pay as determined pursuant to Section 12 of the Federal Employees' Compensation Act is the equivalent of $53.65 per week;

That as a result of such injury the claimant has permanent disability equivalent to 100% permanent total loss of left leg.

That the claimant is entitled to augmented compensation for dependents;

[fol. 62] That for such permanent disability and pursuant to Section 5 of the Federal Employees' Compensation Act the claimant is entitled to 288 weeks' compensation at the rate of $40.24 per week for the period July 1, 1953 to January 6, 1959, inclusive;

Upon the foregoing findings of fact it is ORDERED that there shall be paid from the Employees' Compensation Fund the following:

AWARD

Accrued compensation as follows: the sum of $126.47 covering the period July 1, 1953 to July 22, 1953, inclusive; less $126.47 previously paid from July 1, 1953 to July 22, 1953, inclusive.

Compensation shall thereafter be paid at the rate of $160.96 each four weeks for the period July 23, 1953 to January 6, 1959 inclusive.

Given under my hand at Washington, D. C. this 31 day of July, 1953.

REL:gt

cc:

Mr. Albert J. Vallebuona
1448 Hylan Blvd., Staten Island 4, N. Y.

Chief, Civilian Personnel Branch,
Headquarters, New York Port of
Embarkation, Brooklyn 50, N. Y.

Chief, Retirement Division
U. S. Civil Service Commission
Washington, D. C.
"H" Division

WM. MCCAULEY
Director
/s/ M. E. CASWELL
(Miss) M. E. Caswell
Chief of Section

[fol. 63]

EXHIBIT B TO RESPONDENT'S EXCEPTIVE ALLEGATIONS
COMPENSATION ORDER MODIFICATION OF AWARD

U. S. DEPARTMENT OF LABOR

BUREAU OF EMPLOYEES' COMPENSATION

Case No. X-721293

In the matter of the claim for compensation under the Federal Employees' Compensation Act of

ALBERT J. VALLEBUONA,

Claimant,

Employed by:

DEPARTMENT OF THE ARMY (New York Port of Embarkation, Brooklyn, New York).

Findings of fact, award of compensation, was filed in the above-entitled case on July 31, 1953 awarding claimant 288 weeks compensation at the rate of $40.24 per week from July 1, 1953 to January 6, 1959, inclusive, for 100% permanent total loss of the left leg based on a monthly pay, the equivalent of $53.65 per week as determined pursuant to Section 12 of the Federal Employees' Compensation Act. On the Director's own motion the file was reviewed and upon consideration thereof and after such investigation in respect thereto as is considered necessary, the Director makes the following:

FINDINGS OF FACT

That mistakes were made with respect to the determination of the claimant's pay rate and rate of compensation. That the monthly pay rate as determined pursuant to Section 12 of the Federal Employees' Compensation Act is [fol. 64] the equivalent of $55.58 per week; that the claimant is entitled to compensation at the rate of $41.69 per week.

Upon the foregoing findings of fact the Director makes the following:

AMENDED AWARD

That the award of July 31, 1953 be and the same is hereby MODIFIED as follows:

That there shall be paid from the Employees' Compensation Fund the claimant above named for 100% permanent total loss of the left leg compensation of 288 weeks at the rate of $41.69 per week from July 1, 1953 to January 6, 1959.

Given under my hand at Washington, D. C. this 15th day of September, 1953.

WM. MCCAULEY
Director
by: /s/ M. E. CASWELL
(Miss) M. E. Caswell
Chief of Section

cc:

Mr. Albert J. Vallebuona
1448 Hylan Blvd.
Staten Island, New York

Chief, Civilian Personnel Branch
Headquarters, New York Port of
Embarkation, Brooklyn 50, New York

Chief, Retirement Division
U. S. Civil Service Commission
Washington, D. C.
"H" Division

(Verified by Benjamin H. Berman, June 16, 1954.)

[fol. 65]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OPINION OF INCH, D. J.—July 22, 1954

Appearances:

Leonard P. Moore, U. S. Attorney, Proctor for Respondent, appearing specially.

Jacob Rassner, Proctor for Libellant.

This is an action under the Public Vessels Act and the Suits in Admiralty Act. The libel also alleges that libelant is entitled to the benefits of the Jones Act. It appears from the allegations of the libel that libelant was employed by the United States of America in the capacity of a seaman, i.e. as a deckhand, aboard a vessel owned and operated by the Government. The Government has filed exceptive allegations to the effect that since libelant was a civilian seaman employed on a public vessel his exclusive remedy lies under the Federal Employees' Compensation Act, so that this Court lacks jurisdiction of the subject matter of this action. (*Johansen* v. *United States*, 343 U. S. 427; *Benet* v. *The General M. L. Hersey et al.*, 113 F. Supp. 826; *Bookard* v. *United States*, decided by Judge Rayfiel on September 28, 1953.) The exceptive allegations further allege that libelant filed a claim for compensation for the injury under the Act and that the benefits of an award have been paid and accepted by libelant.

[fol. 66] To be sure, the Government in effect seeks a form of summary judgment, and its exceptive allegations may not be sustained if there exists a substantial issue of fact which should await trial. (*Reconstruction Finance Corp.* v. *The Pueblo*, 97 F. Supp. 2, 4; *C. H. Sprague & Son Co.* v. *Howard*, 68 F. Supp. 348.) However, the libel on its face indicates that libelant was a civilian seaman employed on a public vessel, and the affidavit of his proctor submitted on this application does not dispute that fact. Accord-

ingly, the exceptive allegations must be sustained and the libel dismissed on the above cited authorities.

Settle order.

Robert A. Inch, U. S. D. J.

Dated: July 22, 1954.

[fol. 67]

In United States District Court
Eastern District of New York

Order Sustaining Exceptive Allegations and Dismissing Libel—July 27, 1954

The respondent, appearing specially, having filed exceptive allegations herein and the hearing thereon having duly come on before this Court on July 21, 1954,

Now on reading the libel, respondent's exceptive allegations, notice of hearing dated June 23, 1954 and the affidavit of Jacob Rassner sworn to July 21, 1954, and after hearing Leonard P. Moore, United States Attorney (Benjamin H. Berman, Attorney, Department of Justice), proctor for the respondent and Jacob Rassner, Esq., proctor for the libelant, and upon filing the memorandum of the Court dated July 22, 1954; it is

On motion of Leonard P. Moore, United States Attorney, proctor for the respondent herein

Ordered that the respondent's exceptive allegations herein be and the same hereby are sustained; and it is

Further Ordered that the libel herein be and the same hereby is dismissed.

Dated: Brooklyn, New York, July 27, 1954.

Robert A. Inch, Chief Judge of the United States District Court.

[fol. 68]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 302, 303, 305 & 306.

Docket Nos. 23668, 23669, 23854 & 23855

JAMES S. PATTERSON, as Administrator, Appellant,

v.

UNITED STATES, Appellee.

LEONARD LESTER SULLIVAN, Appellant,

v.

UNITED STATES, Appellee.

MELVIN A. HAYS, Appellant,

v.

UNITED STATES, Appellee.

STERLING EUGENE DUNCAN, Appellant,

v.

UNITED STATES, Appellee.

OPINION—July 11, 1958

[fol. 69] Before: Hand, Hincks and Moore, Circuit Judges.

All these appeals come up from decrees in suits in the admiralty, dismissing libels upon exceptive allegations of the respondent. The libels sought to recover for personal injuries suffered upon "merchant vessels," owned and operated by the United States.

Jacob Rassner and Irwin Asofsy, for the appellants.

Leavenworth Colby, for the appellees.

HAND, Circuit Judge:

These four decrees, entered by Dimock, J., Kaufman, J., Palmieri, J. and Bicks, J., in the order in which the titles are arranged herein, dismissed libels *in personam* to recover for injuries suffered by civil employees of the United States, upon ships, owned and operated by the United States. Patterson is the administrator of one, Doody, who was killed while employed as a machinist on a ship owned and operated by the War Shipping Administration although he was not employed "through" that Administration, and was not therefore covered by the "Clarification Act" of 1943 (50 U. S. Code Appendix §1291). It is to be assumed that Doody met his death because of the unseaworthiness of the ship, or the negligence of those in charge of her, and that his administrator could recover, if the claim arose under the Suits in Admiralty Act (46 U. S. C. §741). Sullivan, Hays and Duncan were all civil service seamen, employed as such upon "merchant vessels," publicly owned and operated ships of the United States. They too sued for injuries suffered under circumstances that would have [fol. 70] entitled them to a recovery, had they been individually employed "through" the War Shipping Administration. All were entitled to compensation under the Federal Employees Compensation Act (5 U. S. Code 751 *et seq.*) and the question in all the suits is whether that was their exclusive remedy, or whether the Suits in Admiralty Act (48 U. S. C. 741 *et seq.*) was also open to them.

In *Johansen* v. *United States*, 343 U. S. 247, the Supreme Court held that a person injured on board a "Public Vessel" owned and operated by the United States might not recover under the Public Vessels Act (46 U. S. C. §781 *et seq.*), his only recourse being under the Federal Employees Compensation Act. The only question before us is therefore whether the same reasoning applies to suits under the Suits in Admiralty Act. In *Johansen's* case the vessel was a troop transport, and could not be regarded as in any

sense a "merchant vessel"; in the case at bar the opposite was true, as we have already said. Save for one consideration that we shall mention in a moment, it might be hard to understand why the language of the Suits in Admiralty Act should not apply: "In cases where if such vessel were privately owned and possessed, * * * a libel in personam may be brought * * * provided that such vessel is employed as a merchant vessel." (46 U. S. C. §742.) Indeed such a conclusion would be reinforced by the preceding section (§741) that forbids the creation of maritime liens on "merchant vessels" of the United States such as would arise if the "merchant vessel" were privately owned. On the other hand, if the proper purport of §742 was generally to assimilate claims against the United States for injuries arising on its "merchant vessels" to those arising in the case of privately owned ships, the "Clarification Act" of 1943 was unnecessary which limited the same relief to "seamen" "employed on United States * * * vessels through the War [fol. 71] Shipping Administration." The Fourth Circuit in *United States* v. *Marine*, 155 Fed. (2) 456, had held that the Suits in Admiralty Act did apply, although the libellant was not employed "through the War Shipping Administration"; and, as a new question, it might have been held that the grant of a claim by the Clarification Act of 1943 did not inevitably presuppose that such claims had not been already covered by the Suits in Admiralty Act. However, the Supreme Court in *Johansen* v. *United States*, *supra* (p. 439), specifically declared that *United States* v. *Marine*, *supra*, was not rightly decided and made no distinction between it and a libel under the "Public Vessels Act." Moreover, the Eighth Circuit in *Inland Waterways Corporation* v. *Doyle*, 204 Fed. (2) 874, although it did distinguish between "public vessels" and "merchant vessels," declared (p. 878): "We have no hesitation in saying that we can conceive no sound reason for making a distinction with respect to remedies between civilian seamen employed by the United States on its 'public vessels.'" It appears not to have observed the disapproval of *United States* v. *Marine*, *supra*, 155 Fed. (2) that we have just mentioned. We feel bound to hold that the Court did not mean to recognize any such distinction which we too

think is not "sound." As *res integra*, there was indeed more reason for reading broadly the "Public Vessels Act" (46 U. S. C. §781) than the "Suits in Admiralty Act" (46 U. S. C. §782) because the "Public Vessels Act," is not subject to the implication arising from the express grant of relief to employees of the War Shipping Board, that is relevant in the interpretation of the "Suits in Admiralty Act."

As for the Clarification Act of 1949 (63 St. L. 854), it is altogether clear that the subsection 2 of §201 and §305(b) were not intended to do more than leave untouched the rights of seamen as they already were (*Johansen* v. *United States*, *supra*, 436-438).

The decrees are affirmed.

[fol. 72]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 304—October Term, 1957.

Docket No. 23702

ALBERT VALLEBUONA, Appellant,

v.

UNITED STATES, Appellee.

Before: Hand, Hincks, Circuit Judges.

On appeal from a decree in the admiralty, Inch J., presiding, dismissing a libel to recover injuries suffered by a civilian seaman of the Army under the Suits in Admiralty Act.

Jacob Rassner and Irwin Asofsy, for the appellant.

Leavenworth Colby, for the appellee.

PER CURIAM—July 11, 1958

Decree affirmed on the authority of *Patterson* v. *United States* and three other cases handed down herewith.

[fol. 73]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES S. PATTERSON, General Administrator for Mobile County Alabama, as Administrator of the Estate of EDGAR A. DOODY, JR., deceased, Libelant-Appellant,

v.

UNITED STATES OF AMERICA, Respondent-Appellee.

JUDGMENT—July 11, 1958

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. Daniel Fusaro, Clerk.

[fol. 74] [File endorsement omitted]

[fol. 75]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LEONARD LESTER SULLIVAN, Libelant-Appellant,

v.

UNITED STATES OF AMERICA, Respondent-Appellee.

JUDGMENT—July 11, 1958

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. Daniel Fusaro, Clerk.

[fol. 76] [File endorsement omitted]

[fol. 77]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALBERT VALLEBUONA, Libelant-Appellant,

v.

UNITED STATES OF AMERICA, Respondent-Appellee.

JUDGMENT—July 11, 1958

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. Daniel Fusaro, Clerk.

[fol. 78] [File endorsement omitted]

[fol. 79]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MELVIN A. HAYES, Libelant-Appellant,

v.

UNITED STATES OF AMERICA, Respondent-Appellee.

JUDGMENT—July 11, 1958

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. Daniel Fusaro, Clerk.

[fol. 80] [File endorsement omitted]

[fol. 81]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STERLING EUGENE DUNCAN, Libelant-Appellant,

v.

UNITED STATES OF AMERICA, Respondent-Appellee.

JUDGMENT—July 11, 1958

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Soutehrn (sic) District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. Daniel Fusaro, Clerk.

[fol. 82] [File endorsement omitted]

[fol. 83] Clerk's Certificate to foregoing Transcript (omitted in printing).

[fol. 84]

SUPREME COURT OF THE UNITED STATES

No. 429—October Term, 1958

JAMES S. PATTERSON, General Administrator for Mobile County, Alabama, etc., LEONARD LESTER SULLIVAN, MELVIN A. HAYS, et al., Petitioners,

vs.

UNITED STATES OF AMERICA.

ORDER ALLOWING CERTIORARI—November 24, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
OCT 8 1958
JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1958

No. 429

JAMES S. PATTERSON, General Administrator for Mobile County, Alabama, as Administrator of the Estate of Edgar A. Doody, Jr., Deceased, *Petitioner*,
against
UNITED STATES OF AMERICA, *Respondent*.

LEONARD LESTER SULLIVAN, *Petitioner*,
against
UNITED STATES OF AMERICA, *Respondent*.

MELVIN A. HAYS, *Petitioner*,
against
UNITED STATES OF AMERICA, *Respondent*.

STERLING EUGENE DUNCAN, *Petitioner*,
against
UNITED STATES OF AMERICA, *Respondent*.

ALBERT VALLEBUONA, *Petitioner*,
against
UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB RASSNER,
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INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Questions Presented 3

Statement of Facts 3

Reason for Granting the Writ 6

POINT I—Language which is susceptible of diametrically contrary construction by an almost equally divided court of the Supreme Court of the United States unquestionably would not be considered as sufficient justification for interpreting an Act of Congress as creating a new cause of action. Accordingly, by the use of the same scales of justice, there is no more justification for interpreting an act so drawn as to destroy an existing cause of action 8

POINT II—Seamen who perform the duties traditionally performed by seamen should not be deprived of the rights granted them by Congress or the benefits which they traditionally enjoy under General Maritime Law 9

POINT III—The Supreme Court of the United States has left open and undecided in the *Johansen* and *Mandel* cases, *supra*, the applicability of said holdings to seamen employed aboard United States Government vessels utilized as merchant vessels, as distinguished from public vessels 10

POINT IV—The Court of Appeals for the Eighth Circuit differs with the Court of Appeals for the Second Circuit, which decisions make the choice of forum a deciding factor as to whether or not a certain class of seamen should or should not be deprived of the rights enjoyed generally by seamen of the United States 10

PAGE

Point V—The United States should be held liable in the operation of its vessels to the same extent as a private shipowner operating similar vessels in similar trade 12

Conclusion 15

Appendix:

Opinion of Hand, Hincks and Moore 17

Opinion of Hand and Hincks 21

Judgment Pertaining to James S. Patterson, General Administrator for Mobile County, Alabama, as Administrator of the Estate of Edgar A. Doody, Jr., Deceased 22

Judgment Pertaining to Leonard Lester Sullivan 23

Judgment Pertaining to Melvin A. Hays 24

Judgment Pertaining to Sterling Eugene Duncan 25

Judgment Pertaining to Albert Vallebuona ... 26

Cases Cited

Cosmopolitan Shipping Co. v. McAllister, 337 U. S. 783, 69 Sup. Ct. 1317 8

Inland Waterways Corp. v. Doyle, 204 Fed. 2d 874 .....3, 7, 10, 11

Johansen v. U. S., 343 U. S. 427, 72 S. Ct. 849.....7, 8, 10, 11, 12, 14

Mandel v. U. S., 343 U. S. 427, 72 S. Ct. 849.....7, 8, 10, 11, 12, 14

Pope & Talbot v. Hawn, 346 U. S. 406, 74 S. Ct. 202.. 9

Statutes Cited

28 U. S. C. 1254(1) 2

5 U. S. C. 751 et seq. 14

Supreme Court of the United States

October Term, 1958

No.

JAMES S. PATTERSON, General Administrator for Mobile County, Alabama, as Administrator of the Estate of Edgar A. Doody, Jr., Deceased,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

LEONARD LESTER SULLIVAN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

MELVIN A. HAYS,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

STERLING EUGENE DUNCAN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ALBERT VALLEBUONA,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals

for the Second Circuit entered in the above causes on July 11, 1958.

Opinions Below

The opinion of the United States District Court for the Southern District of New York, dated February 2, 1955 in the Patterson case is reported at 129 Fed. Supp. 794.

The opinion of the United States District Court for the Southern District of New York, dated April 15, 1955, in the Sullivan case is reported at 130 Fed. Supp. 53.

The memorandum opinion of the United States District Court for the Southern District of New York, dated July 18, 1955, in the Hays case, is reported at 1955 A. M. C. 1803, not otherwise reported.

The memorandum opinion of the United States District Court for the Southern District of New York, dated July 26, 1955, in the Duncan case is reported at 1955 A. M. C. 1804, not otherwise reported.

The opinion of the United States District Court for the Eastern District of New York, dated July 22, 1954 in the Vallebuona case is reported at 1955 A. M. C. 1204, not otherwise reported.

The opinions of the Court of Appeals in these cases (Appendix, pp. 17-21) are not yet reported.

Jurisdiction

The judgments of the Court of Appeals were entered on July 11, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Do men who are seamen "in fact" when employed by the United States Government, lose the rights accorded them by Congress and the rights which seamen enjoy under General Maritime Law, when such "seamen" are designated as "civilian employees", when in truth and in fact, such people actually perform the work traditionally performed by seamen?

2. Does the United States enjoy a special position in commerce by sea so that its employees who perform the work traditionally performed by seamen are barred from maintaining actions against the United States of America, when if such person were employed by a civilian shipowner, their naked designation as "civilian employee" would be deemed a nullity without any force or effect which could possibly deprive a seaman of his rights to maintain an action under *General* Maritime Law or under remedial legislation enacted for the benefit of seamen?

3. Which Court of Appeals, Second Circuit, or Eighth Circuit, has correctly interpreted the law? The Court of Appeals for the Second Circuit in the instant cases or the Court of Appeals for the Eighth Circuit in the case of *Inland Waterways Corp. v. Doyle*, 204 Fed. 2d 874.

Statement of Facts

Ths is a consolidated appeal in the five above-named actions involving common questions of law.

(1) James S. Patterson, as Administrator of the Estate of Edgar A. Doody, Jr., filed a libel on July 30, 1947, to recover for the wrongful death of the intestate on August 1, 1945. Decedent was a machinist employed by the Mechanical Division of the Panama Canal, an unincorporated agency of the United States, as a shore employee.

Doody was ordered to board the SS. HANGING ROCK, operated for the War Shipping Administration by War Emergency Tankers, Inc. He was ordered to check and adjust the speed of the forward feed pump turbine in the lower engine room. In the presence of a ship's officer he commenced his duties. The aforesaid ship's officer started up the turbine, and immediately parts of the governor mechanization broke from the turbine rotor, struck Doody on the left side of his head rendering his unconscious and causing his death. It is alleged that the machinery was in all respects defective and deceased was caused to suffer injuries and death by virtue of the said defective machinery which broke loose without warning.

Decedent was 33 years of age at the time of his death.

(2) Libelant, Albert Vallebuona, filed a libel on February 23, 1954, for injuries sustained on March 10, 1952, while employed as deckhand with the Motor Vehicle Dispatcher, Cargo Traffic Division, on the Government Barge 6034, then at the Brooklyn Army Base, Brooklyn, New York. Libelant was assigned the duty of securing the aforesaid barge unaided when his foot became enmeshed in the securing line and was forced against the bitt and his said left leg was crushed, necessitating an amputation of his left foot and ankle.

(3) Libelant Melvin A. Hays filed a libel on December 21, 1953, to recover for illness, to wit: tuberculosis, sustained by him while a member of the crew of the SS. MISSOURI. Liability is predicated upon the existence of conditions aboard the steamship vessel, such as dampness, inadequate and insufficient heating, maintenance and supervision of quarters, and defective ventilating machinery.

(4) Libelant Sterling Eugene Duncan filed a libel on June 29, 1953, to recover for illness, to wit: tuberculosis,

sustained by him while employed as a fireman on the SS. BATON ROUGE, managed and operated by the Inland Waterways Corporation. Liability is predicated upon the conditions existing aboard the aforesaid vessel, to wit: dampness, insufficient heating, inadequate maintenance and supervision of quarters and defective ventilating mechanisms.

(5) Leonard Lester Sullivan filed a libel on June 29, 1953, for injuries sustained by him on May 4, 1952, while employed by Inland Waterways Corporation in the capacity of deckhand on board the SS. ILLINOIS, owned and operated by the Inland Waterways Corporation. Libelant had been breaking ratchets in the tow of barges and subsequently returned to the tug while carrying an ax in his hand. As he stepped aboard the vessel at night, and by virtue of the absence of any light whatsoever, libelant's foot was caught in a steel cable, negligently permitted to remain on the deck, creating a hazardous condition, causing him to be swung about and hurled to the deck striking both shoulders against rope coils. Libelant suffered severe injuries to his lower back and legs. Libelant was 21 years of age at the time of the accident.

The Vallebuona libel involved a vessel in the public service of the United States and the other vessels were employed in the merchant service.

Libelant Patterson's intestate was a shoreside employee. Libelant Vallebuona, Hays, Duncan and Sullivan were all seamen.

In each action, respondent is liable by virtue of the negligence of its officers, agents, servants and employees, as well as by virtue of the manifest unseaworthiness of the vessels involved.

Reason for Granting the Writ

1. An Act of Congress has been interpreted by the Courts below as creating a new bar to a seaman's action or destroying rights formerly provided for the protection and benefit of seamen in the absence of language of the Act clearly susceptible of no other reasonable construction, but on the contrary, in the face of language which has caused Justices of the Supreme Court to be almost evenly divided as to the meaning and intent of said Act.

Insofar as the law is clearly established with relation to the creation of a new basis for a cause of action, it follows with the same force that the law should be likewise interpreted when an attempt is made to eliminate an existing basis for a cause of action.

Mr. Leavenworth Colby, Chief of the Admiralty and Shipping Section, who argued the within matters before the Circuit Court of the United States for the Second Circuit, after such argument, which took place on the 16th day of May, 1958, on the 29th day of May, 1958, wrote duplicate letters to Honorable Learned Hand, Honorable Carroll C. Hincks and Honorable Leonard P. Moore, calling their attention, amongst other things, to the following which is a quote from his letter on page 4 thereof:

> "Indeed, as the Court well said in *Kuhnert* v. *United States,* (8th Cir., 1942) 127 F. 2d 824, 826, 'We think that no court would be justified in interpreting an Act of Congress as creating a new cause of action against, or imposing a new liability upon, the United States unless the language of the act was clearly susceptible of no other reasonable construction.' See also *Atchley* v. *Tennessee Valley Authority* (N. D. Ala., 1947), 69 F. Supp. 952, 954. 'Jurisdiction of the defendant now exists where the defendant was immune from suit before; it remains for courts, in the exercise of their jurisdiction to determine whether any claim is recognizable in law.' *Feres* v. *United States,* 340 U. S. at 141."

The thought expressed in Mr. Colby's letter is that the law is well settled that an Act of Congress should not be interpreted as creating a new cause of action unless the language of the Act " * * * was clearly susceptible of no other reasonable construction."

However, by the force of the same argument, the same procedure should be followed in not destroying an existing cause of action under circumstances where a new cause of action would not be created.

2. Many seamen employed by the United States of America are being deprived of their rights by the expedient of designating them as "civilian employees", when in truth and in fact, they perform the duties traditionally performed by seamen.

3. The United States Supreme Court has left open in the cases of *Johansen* v. *U. S.* and *Mandel* v. *U. S.*, 343 U. S. 427, 72 S. Ct. 849, the question as to whether or not a civilian employee may maintain an action against the United States of America, or is relegated to the exclusive remedy of federal compensation if he was injured aboard a United States owned vessel engaged in general merchant service, rather than public service.

4. There is a conflict between various Appellate Courts of the United States, particularly between the Court of Appeals for the Second Circuit in the appeals herein sought to be reviewed, and the Court of Appeals for the Eighth Circuit in the case of *Inland Waterways Corp.* v. *Doyle*, 204 Fed. 2d 874.

5. There seems to be no distinction in the conditions under which seamen, labelled "civilian employees", work or the kind of duties they perform than the conditions or duties of seamen on privately owned vessels, and it would therefore seem that justice is not served when the United States of America enjoys special privileges which are not granted to private shipowners under identical circumstances.

6. The decisions in the *Johansen* and *Mandel* cases, *supra*, have resulted in grave inequalities to seamen, so that their rights of recovery are dependent upon their designation as "seamen" or "civilian employees", rather than on the duties which they perform.

7. The United States Supreme Court has stated that where circumstances are so altered that a reversal of its prior decision is justified to meet changing events, the Court will not hesitate to reverse itself. *Cosmopolitan Shipping Co. v. McAllister*, 337 U. S. 783, 69 Sup. Ct. 1317.

POINT I

Language which is susceptible of diametrically contrary construction by an almost equally divided court of the Supreme Court of the United States unquestionably would not be considered as sufficient justification for interpreting an Act of Congress as creating a new cause of action. Accordingly, by the use of the same scales of justice, there is no more justification for interpreting an act so drawn as to destroy an existing cause of action.

We beg the indulgence of the Court for our repetition under this Point of our argument under Point I of our reasons for granting the Writ.

> "Indeed, as the Court well said in *Kuhnert* v. *United States* (8th Cir., 1942), 127 F. 2d 824, 826, 'We thing that no court would be justified in interpreting an Act of Congress as creating a new cause of action against, or imposing a new liability upon, the United States unless the language of the act was clearly susceptible of no other reasonable construction.' See also *Atchley* v. *Tennessee Valley Authority* (N. D. Ala., 1947), 69 F. Supp. 952, 954. 'Jurisdiction of the defendant now exists where the defendant was immune from suit before; it remains for courts, in the exercise of their jurisdiction to determine

whether any claim is recognizable in law.' *Feres* v. *United States*, 340 U. S. at 141."

The thought expressed in Mr. Colby's letter is that the law is well settled that an Act of Congress should not be interpreted as creating a new cause of action unless the language of the Act " * * was clearly susceptible of no other reasonable construction."

However, by the force of the same argument, the same procedure should be followed in not destroying an existing cause of action under circumstances where a new cause of action would not be created.

POINT II

Seamen who perform the duties traditionally performed by seamen should not be deprived of the rights granted them by Congress or the benefits which they traditionally enjoy under General Maritime Law.

When in truth and in fact a person is a seaman, there seems no justification for treating him differently than any other seaman by the mere labelling of such seaman as a "civilian employee".

It would seem that a person should have the right to show that he was in fact a seaman and thereby entitled to the same benefits of law as any other seaman, rather than to summarily deny to him access to our Courts by the mere expedient of labelling him a "civilian employee".

The Supreme Court of the United States has stated in unequivocal language that it is not concerned with form but only with substantial justice. *Pope & Talbot* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202.

POINT III

The Supreme Court of the United States has left open and undecided in the *Johansen and Mandel* cases, *supra*, the applicability of said holdings to seamen employed aboard United States Government vessels utilized as merchant vessels, as distinguished from public vessels.

Uniformity of maritime law seems to be in conflict with the holding that a person performing seamen's duties on a Government owned vessel in public use is not entitled to the same protection and benefit of loss as a person performing the identical duties on an identical vessel identically owned but used as a merchant vessel rather than a public vessel.

Such holding imposes on a seaman the often impossible burden of proving the nature of the cargo and the service of the vessel on that particular voyage, which information is difficult if not impossible to ascertain.

Such distinction does not tend to mete out equal justice to all persons doing the identical work and performing the identical duties. Distinctions are made in law when they do not exist in truth or in fact.

POINT IV

The Court of Appeals for the Eighth Circuit differs with the Court of Appeals for the Second Circuit, which decisions make the choice of forum a deciding factor as to whether or not a certain class of seamen should or should not be deprived of the rights enjoyed generally by seamen of the United States.

The case of *Inland Waterways Corp.* v. *Doyle*, 204 Fed. 2d 874, specifically affirmed this distinction and squarely held that the Federal Employees Compensation Act does not provide an exclusive remedy for injury aboard a mer-

chant vessel. The Court distinguished the *Johansen* and *Mandel* cases on the specific ground that the aforesaid cases involved a public vessel and did not apply where the vessel in suit was a merchant vessel. Specific language of the Supreme Court in that decision was referred to by the Eighth Circuit as confirming the essential validity of the distinction.

In that case the Court said:

> "* * * There are, however, a number of statements in the opinion which indicate that the Supreme Court thought that the rights and remedies of such seamen depended upon whether the vessel upon which they were employed was a 'public vessel' or a 'merchant vessel'."

Thereafter, the Circuit Court pointed to portions of the Court's opinion which drew a distinction between seamen on public and merchant vessels and concluded on page 878:

> "Four of the Justices dissented in the Johansen case, and it seems reasonably apparent that the Justices who joined in the majority opinion were of the view that civilian seamen on a merchant vessel owned by the United States were not precluded by the Federal Employees' Compensation Act from electing to sue under the Suits in Admiralty Act for personal injuries received in the line of duty as the result of negligence."

This distinction is sound inasmuch as the vessels employed in the merchant service more directly compete with private shipowners and the principle of the necessity of uniformity and of unfair competition would more necessarily require that the seamen of merchant vessels be treated in precisely the same fashion, whether employed on private or government vessels.

The decision of *Inland Waterways Corp.* v. *Doyle*, *supra*, which appellant submits is in accord with sound legal principles, is in conflict with certain other decisions and said conflict requires resolution.

POINT V

The United States should be held liable in the operation of its vessels to the same extent as a private shipowner operating similar vessels in similar trade.

The Court below has relied on the decisions in the *Johansen* and *Mandel* cases in affirming the District Courts which sustained exceptive allegations to the libels in the respective cases herein involved.

The Court below felt constrained to follow the aforesaid decisions construing them as holding the remedy under the Federal Employees Corporation Act an exclusive remedy in actions for personal injuries by government employees injured on government vessels, although as hereinafter set forth, both involved public vessels as distinct from merchant vessels.

However, it is the contention of the appellants that circumstances have so changed since the *Johansen* and *Mandel* decisions as to require a reversal, and the adoption of the views expressed in the dissenting opinion in said cases.

The progress of shipping, both of merchant and public vessels demonstrate conclusively that the views expressed in the aforesaid dissenting opinion more adequately meet the needs of present day public and private shipping and tends to foster uniformity of maritime law and dispense equal justice to people similarly situated with others.

It is common knowledge, of which judicial notice must be taken, that to an increasing extent the United States has been utilizing the vessels owned and controlled by it, in commercial service. The United States is operating vessels in the same fashion as private steamship company operators and is in direct and continuous competition with such private shipowners. The adoption of the majority view in *Johansen* and *Mandel* creates a condition of dis-

tinctly unfair competition as against the private shipowner whose very existence is essential to the existence and continuance of a sound Merchant Marine so necessary to national defense.

Rights and privileges enjoyed by seamen on privately owned vessels are denied to them when they perform such duties on a vessel used in public service, if such seamen happen to be designated "civilian employees".

Experience indicates that not merely is there created such a condition of unfair competition aggravated by such a view, but also such doctrine destroys the uniformity in admiralty practice, so long highly regarded as the ideal and principle upon which American Admiralty Law is based. It is hornbook law that such uniformity is an essential concept which the courts will enforce.

The granting of rights to persons injured aboard privately owned vessels not granted to those similarly injured on vessels of the United States, although in identical capacities, destroys this uniformity and is repugnant to American judicial concepts. This is particularly true in times of expanding governmental use of vessels carrying commercial cargoes.

It is a factual matter that seamen are employed for a period of time only and frequently just briefly on a particular vessel, and often are not aware of the particular ownership of a particular vessel on which they may be serving. It is entirely incongruous to hold that his rights are to be determined by the fortuitous circumstance of ownership of the vessel. It is particularly so when he is employed one day on a privately owned vessel and on the next on a government owned one. Certainly, a seaman's rights should not depend upon the nature of the cargo as to whether or not our Civil Courts will be open to such seamen for the recovery of damages.

The fact that changing circumstances continually require restatement and reexamination of principles, particu-

larly in the Maritime field is shown by the fact that the Federal Employees Compensation Act, 5 U. S. C. 751 *et seq.*, enacted in 1916 was followed by the Jones Act, the Suits in Admiralty Act and the Public Vessels Act, all designed for expanding needs, and, in addition thereto, the Compensation Act itself was amended in 1949 with a specific exemption for seamen.

In view of the aforesaid, it is respectfully submitted that the aforesaid dissenting opinion the *Johansen* and *Mandel* cases, *supra*, be adopted.

It would appear that justice can best be provided by adopting the dissenting opinion in the *Johansen* and *Mandel* cases, *supra*.

In that opinion it was stated:

> "The Court, as it must, concedes that these actions are properly brought if the 'literal language' of the Public Vessels Act be adhered to"
>
> * * *
>
> "The Court's holding is as unique as the reasoning behind it. Time and time again during the last thirty years other federal courts have allowed injured employees to take their pick-receive compensation benefits, or sue for damages under the Public Vessels or some other Act. Moreover, the Court gives the Government precisely what Congress, after debate, refused to give in 1949. Government representatives then asked Congress to make the Compensation Act 'exclusive, and in place of all other liability of the United States.' The House yielded to this request. The House Report favoring the change stated that when the Compensation Act was enacted in 1916 a 'provision making the Compensation remedy exclusive apparently was then not deemed by the Congress to be necessary.' The Report also stated that such a provision was now needed because of acts such as the Public Vessels Act which 'in general terms' authorize the bringing of damage suits against the Government. The Senate refused to grant the Government's request and

prevailed upon the House to accept the present provision of the Act which states that: 'Nothing contained in this Act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel.' This Senate modification of the Bill, as it had passed the House, was offered by Senator Morse and accepted by Senator Douglas who was in charge of the bill. In offering this modification, Senator Morse said: 'Under existing law, Government-employed seamen have been accorded the right to assert their maritime rights against the United States under the Suits in Admiralty Act and Public Vessels Act * * *.' I feel they should not be deprived of benefits they have enjoyed for many years without opportunity to have their arguments carefully considered by the appropriate committees of the Congress * * *.' 95 Cong. Rec. 13608. Senator Douglas agreed to the modification, stating that 'The primary consideration for accepting the Senator's amendments preserving the maritime rights and other statutory remedies of seamen is the fact that no hearings were held, no arguments were heard, and no discussion was had on this aspect of the pending bill.' 95 Cong. Rec. 13609.

I do not think this Court should deprive these seamen of rights which the Congress of 1925 gave them and the Congress of 1949 refused to take away." (pp. 858-859).

* * *

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

APPENDIX

Opinion of Hand, Hincks and Moore

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 302, 303, 305 & 306

(Argued May 16, 1958 Decided July 11, 1958)

Docket Nos. 23668, 23669, 23854 & 23855

JAMES S. PATTERSON, as Administrator,

Appellant,

v.

UNITED STATES,

Appellee.

LEONARD LESTER SULLIVAN,

Appellant,

v.

UNITED STATES,

Appellee.

MELVIN A. HAYS,

Appellant,

v.

UNITED STATES,

Appellee.

STERLING EUGENE DUNCAN,

Appellant,

v.

UNITED STATES,

Appellee.

Before:

HAND, HINCKS and MOORE, *Circuit Judges.*

All these appeals come up from decrees in suits in the admiralty, dismissing libels upon exceptive allegations of the respondent. The libels sought to recover for personal injuries suffered upon "merchant vessels", owned and operated by the United States.

JACOB RASSNER and IRWIN ASOFSY, for the appellants.
LEAVENWORTH COLBY, for the appellees.

HAND, *Circuit Judge*:

These four decrees, entered by Dimock, *J.*, Kaufman, *J.*, Palmieri, *J.* and Bicks, *J.*, in the order in which the titles are arranged herein, dismissed libels *in personam* to recover for injuries suffered by civil employees of the United States, upon ships, owned and operated by the United States. Patterson is the administrator of one, Doody, who was killed while employed as a machinist on a ship owned and operated by the War Shipping Administration although he was not employed "through" that Administration, and was not therefore covered by the "Clarification Act" of 1943 (50 U. S. Code Appendix § 1291). It is to be assumed that Doody met his death because of the unseaworthiness of the ship, or the negligence of those in charge of her, and that his administrator could recover, if the claim arose under the Suits in Admiralty Act (46 U. S. C. § 741). Sullivan, Hays and Duncan were all civil service seamen, employed as such upon "merchant vessels", publicly owned and operated ships of the United States. They too sued for injuries suffered under circumstances that would have entitled them to a recovery, had they been individually employed "through" the War Shipping Administration.

All were entitled to compensation under the Federal Employees Compensation Act (5 U. S. Code 751 *et seq.*) and the question in all the suits is whether that was their exclusive remedy, or whether the Suits in Admiralty Act (48 U. S. C. 741 *et seq.*) was also open to them.

In *Johansen* v. *United States*, 343 U. S. 247, the Supreme Court held that a person injured on board a "Public Vessel" owned and operated by the United States might not recover under the Public Vessels Act (46 U. S. C. § 781 *et seq.*), his only recourse being under the Federal Employees Compensation Act. The only question before us is therefore whether the same reasoning applies to suits under the Suits in Admiralty Act. In *Johansen's* case the vessel was a troop transport, and could not be regarded as in any sense a "merchant vessel"; in the case at bar the opposite was true, as we have already said. Save for one consideration that we shall mention in a moment, it might be hard to understand why the language of the Suits in Admiralty Act should not apply: "In cases where if such vessel were privately owned and possessed, * * * a libel in personam may be brought * * * provided that such vessel is employed as a merchant vessel." (46 U. S. C. § 742.) Indeed such a conclusion would be reinforced by the preceding section (§ 741) that forbids the creation of maritime liens on "merchant vessels" of the United States such as would arise if the "merchant vessel" were privately owned. On the other hand, if the proper purport of § 742 was generally to assimilate claims against the United States for injuries arising on its "merchant vessels" to those arising in the case of privately owned ships, the "Clarification Act" of 1943 was unnecessary which limited the same relief to "seamen" "employed on United States * * * vessels through the War Shipping Administration." The Fourth Circuit in *United States* v. *Marine*, 155 Fed. (2) 456, had held that the Suits in Admiralty Act did apply, although the libellant was not employed "through the War

Shipping Administration"; and, as a new question, it might have been held that the grant of a claim by the Clarification Act of 1943 did not inevitably presuppose that such claims had not been already covered by the Suits in Admiralty Act. However, the Supreme Court in *Johansen* v. *United States*, *supra* (p. 439), specifically declared that *United States* v. *Marine*, *supra*, was not rightly decided and made no distinction between it and a libel under the "Public Vessels Act." Moreover, the Eighth Circuit in *Inland Waterways Corporation* v. *Doyle*, 204 Fed. (2) 874, although it did distinguish between "public vessels" and "merchant vessels", declared (p. 878): "We have no hesitation in saying that we can conceive no sound reason for making a distinction with respect to remedies between civilian seamen employed by the United States on its 'public vessels.'" It appears not to have observed the disapproval of *United States* v. *Marine*, *supra*, 155 Fed. (2) that we have just mentioned. We feel bound to hold that the Court did not mean to recognize any such distinction which we too think is not "sound". As *res integra*, there was indeed more reason for reading broadly the "Public Vessels Act" (46 U. S. C. § 781) than the "Suits in Admiralty Act" (46 U. S. C. § 782) because the "Public Vessels Act", is not subject to the implication arising from the express grant of relief to employees of the War Shipping Board, that is relevant in the interpretation of the "Suits in Admiralty Act".

As for the Clarification Act of 1949 (63 St. L. 854), it is altogether clear that the subsection 2 of § 201 and § 305(b) were not intended to do more than leave untouched the rights of seamen as they already were (*Johansen* v. *United States*, *supra*, 436-438).

The decrees are affirmed.

Opinion of Hand and Hincks

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 304—October Term, 1957

(Argued May 16, 1958 Decided July 11, 1958)

Docket No. 23702

—o—

ALBERT VALLEBUONA,

Appellant,

v.

UNITED STATES,

Appellee.

—o—

Before:

HAND, HINCKS, *Circuit Judges.*

On appeal from a decree in the admiralty, Inch, *J.*, presiding, dismissing a libel to recover injuries suffered by a civilian seaman of the Army under the Suits in Admiralty Act.

JACOB RASSNER and IRWIN ASOFSY, for the appellants.

LEAVENWORTH COLBY, for the appellees.

PER CURIAM:

Decree affirmed on the authority of *Patterson* v. *United States* and three other cases handed down herewith.

Judgment Pertaining to James S. Patterson, General Administer for Mobile County, Alabama, as Administer of the Estate of Edgar A. Doody, Jr., Deceased

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of July, one thousand nine hundred and fifty-eight.

Present:

HON. LEARNED HAND,
" CARROLL C. HINCKS,
" LEONARD P. MOORE,
Circuit Judges.

—o—

JAMES S. PATTERSON, General Administer for Mobile County, Alabama, as Administer of the Estate of EDGAR A. DOODY, JR., deceased,

Libelant-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

—o—

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

Judgment Pertaining to Leonard Lester Sullivan

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of July, one thousand nine hundred and fifty-eight.

Present:

HON. LEARNED HAND,
" CARROLL C. HINCKS,
" LEONARD P. MOORE,
Circuit Judges.

—o—

LEONARD LESTER SULLIVAN,
Libelant-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

—o—

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

Judgment Pertaining to Melvin A. Hays

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of July, one thousand nine hundred and fifty-eight.

Present:

HON. LEARNED HAND,
" CARROLL C. HINCKS,
" LEONARD P. MOORE,
Circuit Judges.

—o—

MELVIN A. HAYS,
Libelant-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

—o—

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

Judgment Pertaining to Sterling Eugene Duncan

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of July, one thousand nine hundred and fifty-eight.

Present:

HON. LEARNED HAND,
" CARROLL C. HINCKS,
" LEONARD P. MOORE,
Circuit Judges.

———o———

STERLING EUGENE DUNCAN,
Libelant-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

———o———

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

Judgment Pertaining to Albert Vallebuona

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of July, one thousand nine hundred and fifty-eight.

Present:

HON. LEARNED HAND,
" CARROLL C. HINCKS,
Circuit Judges.

—o—

ALBERT VALLEBUONA,
Libelant-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

—o—

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

FILED
NOV 5 1958
JAMES R. BROWNING, Clerk

No. 429

In the Supreme Court of the United States

OCTOBER TERM, 1958

JAMES S. PATTERSON, GENERAL ADMINISTRATOR FOR MOBILE COUNTY, ALABAMA, AS ADMINISTRATOR OF THE ESTATE OF EDGAR A. DOODY, JR., DECEASED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 429

JAMES S. PATTERSON, GENERAL ADMINISTRATOR FOR MOBILE COUNTY, ALABAMA, AS ADMINISTRATOR OF THE ESTATE OF EDGAR A. DOODY, JR., DECEASED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

In *Johansen* v. *United States,* 343 U. S. 427, this Court held that a civilian employee of the United States who was covered by the Federal Employees Compensation Act, and who was injured in the performance of his duty as a seaman on a publicly owned and operated vessel, employed solely for public purposes, might not recover by suit under the Public Vessels Act (which supplemented and amended the Suits in Admiralty Act).

Upon the basis of the *Johansen* decision and the reasoning expressed therein, the court below has held that civilian employees of the United States who are covered by the Federal Employees Compensation Act,

JAN 30 1959

JAMES R. BROWNING, Cl

Supreme Court of the United States

October Term, 1958

No. 429

JAMES S. PATTERSON, General Administrator for Mobile County, Alabama, etc., LEONARD LESTER SULLIVAN, MELVIN A. HAYS, ET AL.,

Petitioners,

against

UNITED STATES OF AMERICA.

BRIEF FOR PETITIONERS

JACOB RASSNER,
Counsel for Petitioners.

JOHN J. GLYNN,
IRWIN OSOFSKY,
S. ELDRIDGE SAMPLINER,
Associate Counsel.

INDEX

PAGE

Statement of Facts 1

Questions Presented on This Appeal 3

POINT I—The United States is liable in the operation of vessels to the same extent as a private shipowner with regard to personal injuries sustained by its employees 4

POINT II—Government employees injured aboard vessels utilized in the merchant service may recover under the Suits in Admiralty Act and are not relegated to compensation as exclusive remedy 8

POINT III—The burden of determining whether or not a United States Government owned vessel was a "merchant vessel" or a "public vessel" destroys uniformity of decision in Admiralty law and raises a problem which just cannot be met as a matter of fact 17

CONCLUSION 33

Cases Cited

Albright v. Pennsylvania R. R. (1944), 183 Md. 421, 37 A. (2d) 870 23

American Stevedores Inc. v. Porello, 330 U. S. 446, 67 S. Ct. 847, 91 L. Ed. 1011 14

Attualita, The, 238 Fed. 909 33

Bailey v. Central Vermont Ry. (1943), 319 U. S. 350, 63 S. Ct. 1062 ..... 14, 25

Baird v. New York Cent. R. R. (1949), 299 N. Y. 213, 86 N. E. (2) 567 23

Baltimore Steel Co. v. Burch, 49 A. 2d 542 (M. D. 1946) 29

Birchett v. Tuf-nut Garment Manufacturing Co., 205 Ark. 483, 169 S. W. 2d 574, 577, 579 (1943) 30

Boudoin v. Lykes Bros. Steamship Co., 75 S. Ct. 382, 348 U. S. 382 34

Bowers v. Hollinger, et al. (1946), 4 D. L. R. 186 .. 29

PAGE

Canadian Aviator, Ltd. v. United States, 324 U. S. 215, 65 S. Ct. 639, 89 L. Ed. 901 14
Carolinian, The, 257 U. S. 419, 66 L. Ed. 299, 42 Sup. Ct. Rep. 159 ..... 31, 32, 33
City of Philadelphia, The, 263 Fed. 234 33
Clark v. Village of Hemingsford, 147 Neb. 1044, 26 N. W. 2d 15, 22 (1947) 30
Cosmopolitan Shipping Co. v. McAllister, 337 U. S. 783, 69 S. Ct. 1317 6
Cowan v. Inland Waterways Corporation, 121 F. S. 683 ..... 10, 11
Dalehite v. United States of America, 346 U. S. 15, 73 S. Ct. 956 16
Dixon v. United States of America, 219 F. 2d 10 17
Ericksen v. Southern Pacific R. R. (1952), 39 Cal. (2d) 374, 246 P. (2d) 642 23
Feres v. United States, 340 U. S. 135, 139, 71 S. Ct. 153, 156, 95 L. Ed. 152 16
Florence, H. The, 248 Fed. 1012 33
Ford v. Louisville, etc. R.R. (1946), 355 Mo. 362, 196 S. W. (2d) 163 24
Gibbs v. United States, D. C., 94 F. Supp. 586, 588-589 6
Gloria, The, 267 Fed. 929 33
Goodyear Aircraft Corp v. Industrial Commission, 62 Ariz. 398, 158 P. 2d 511 (1945) 30
Great Northern Ry. v. Industrial Comm'n (1944), 245 Wisc. 375, 14 N. W. (2d) 152 23
Griffith v. Goforth, 184 Tenn. 56, 195 S. W. 2d 33, 38 (1946) 30
Harris v. Missouri Pacific R.R. (1944), 158 Kan. 679, 149 P. (2d) 342 23
Hawkins v. Bleakly, 243 U. S. 210 23
Herbert v. Ford Motor Co., 285 Mich. 607, 610, 281 N. W. 374, 375 (1938) 30

PAGE

Hisko, The U.S.S. (Circuit Judge Manton, S. D. N. Y.) (March 17, 1921, unreported opinion) 33
Hollenbach, Phil Co. v. Hollenbach, 181 Ky. 262, 204 S. W. 152 (1918) 29
Hood v. Texas Indemnity Ins. Co., 209 S. W. 2d 345 (Tex. 1948) 30

Industrial Commission of Ohio v. Weigrandt, 102 Ohio St. 1, 130 N. E. 38 (1921) 29
Inland Waterways Corp. v. Doyle, 204 Fed. 2d 874 8
Ives v. So. Buffalo Ry. Co., 201 N. Y. 271 14

Jensen, In re (Jensen v. Manning & Brown Inc.), 178 P. 2d 897, 900 (Wo. 1947) 30
Johansen v. U. S., 343 U. S. 427, 72 S. Ct. 849 ...3, 4, 6, 8, 9, 11, 14, 15, 17
Johnson v. United States, 4 Cir., 186 F. 2d 120 6
Johnson Lighterage Co., 231 Fed. 365 33

Kansas City Fibre Box Co. v. Cornell, 5 F. 2d 398, 43 A. L. R. 478 (8 Cir. 1925) 29
Keen v. Overseas Tank Corporation, 194 F. 2d 515, c. d. 72 S. Ct. 1061, 343 U. S. 966 34

Lavender v. Kurn (1946), 327 U. S. 645, 66 S. Ct. 740 ..... 14, 25
Liberty, The, 257 U. S. 419, 66 L. Ed. 299, 42 Sup. Ct. Rep. 159 ..... 31, 33
Luckenbach, The F. J., 267 Fed. 931 33
Luigi, The, 230 Fed. 493 33

Mandel v. U. S., 343 U. S. 427, 72 S. Ct. 849 ...3, 4, 6, 8, 11, 14, 16, 17
Mountain Timber Co. v. Washington, 243 U. S. 219 .. 23

Newark, The U. S. S. (District Judge Knox, S. D. N. Y.) (March 18, 1921, unreported opinion) 33
New York Central Rail. Co. v. White, 243 U. S. 188 .. 23

Osceola, The, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760 26
Othello, The, 5 Blatchf. 343 33

PAGE

Pedersen v. Delaware, L. & W. R. Co. (1913), 229 U. S. 146, 33 S. Ct. 648 24
Petterson v. Alaska S. S. Co., 205 Fed. 2d 478, aff'd 74 S. Ct. 601; 347 U. S. 396, rehearing denied, 74 S. Ct. 848, 347 U. S. 994 26
Pigque v. Baldwin (1942), 154 Kan. 707, 121 P. (2d) 183 23
Pocahontas, U. S. S. (Circuit Judge Manton, S. D. N. Y.) (March 17, 1921, unreported opinion) 33
Pope & Talbot v. Hawn, 346 U. S. 406, 74 S. Ct. 202 .. 26
Posey v. Tennessee Valley Authority, 5 Cir., 1937, 93 F. 2d 726 6
Post v. Burger & Gohlke, 216 N. Y. 544, 553, 554, 11 N. E. 351, Ann. Cases 1916 B. 158 (1916) 29
Roanoke, U.S.S. (Circuit Judge Manton, S. D. N. Y.) (March 17, 1921, unreported opinion) 33
Robinson v. Penn R. Co. (1953), 113 F. Supp. 863 ... 24
Rogers v. United States Lines Company, 205 Fed. 2d 57, 347 U. S. 984, 74 S. Ct. 849 26
Rounds v. Cloverport Foundry & Machine Co., 237 U. S. 303, 306, 59 L. ed. 966, 967, 35 Sup. Ct. Rep. 596 31
Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872 26
Shanks v. Union Pacific R.R. (1942), 155 Kan. 584, 127 P. (2d) 431 ..... 23, 25
Sixaola, The U.S.S. (District Judge Mayer, S. D. N. Y.) (April 21, 1921, unreported opinion) 33
St. Louis, S.F. Ry. v. Wacaster (1947), 210 Ark. 1080, 199 S. W. (2d) 948 24
Stone v. New York, C. & St. L.R. Co (1953), 344 U. S. 407, 73 S. Ct. 358, reversing (Mo. Sup. 1952), 249 S. W. (2d) 442 25
Tampico, The, 16 Fed. 491 33
Tennant v. Peoria P.U.R. Co. (1944), 321 U. S. 29, 64 S. Ct. 409 ..... 14, 25

PAGE

Thompson Navigation Co. v. City of Chicago, 79 Fed. 984 33
Thoresen v. Schmahl, 222 Minn. 304, 24 N. W. 2d 273, 276 (1946) 30
Tiller v. Atlantic Coast Line R. Co (first appeal) (1943), 318 U. S. 54, 58, 64, 63 S. Ct. 444; (second appeal) (1945), 323 U. S. 574, 65 S. Ct. 421 ..... 14, 25
Trucco v. Erie R.R. (1946), 353 Pa. 320 45 A. (2d) 20 23
Urie v. Thompson, 337 U. S. 163, 69 S. Ct. 1018 17
Western Maid, The, 257 U. S. 419, 66 L. Ed. 299, 42 Sup. Ct. Rep. 159 .....31, 32, 33
Wilkins v. Blanchard-McDonald Lumber Co., 52 A. 2d 781, 783 (Vt. 1947) 30
Workman v. New York City, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212 32

Acts and Statutes Cited

British Compensation Act of 1897 and 1906 13
Federal Control Act of 1918 6
Federal Employees' Compensation Act, 5 U. S. C. 751 et seq. 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 17, 18, 19, 20, 21, 22, 23
Federal Employers' Liability Act, 53 Stat. 1404; 45 U. S. C. Sec. 51 .....23, 24, 33
Federal Tort Claims Act, 28 U. S. C. 1346, et seq.... 6, 14
House Report No. 729 7
Jones Act, 46 U. S. C. Sec. 688 .....5, 22, 23,32
Longshoreman and Harbor Workers' Compensation Act 21
Nacca, Volumes 3 and 4 .....27, 28, 31
The Panama Canal Act of August 24, 1912, 37 Stat. 560, 48 U. S. C. A. Sec. 1301 et seq. 20
Public Vessels Act, 46 U. S. C. Sec. 781 et seq...5, 6, 7, 8, 11, 12, 14, 17, 18, 23, 24, 26, 27, 32

PAGE

Suits in Admiralty Act, 46 U. S. C. Sec. 741 et seq...5, 6, 7, 9, 12, 14, 17, 18, 22, 23, 24, 26, 27, 32
66 Cong. Rec. 3560 15
95 Cong. Rec. 13609 7
Article by Dean Roscoe Pound 10
Article by Samuel B. Horovitz 27
Article, The Litigious Phrase "arising out of employment", Nacca Law Journal, Vols. 3 and 4..... 31
British Consolidating Act of 1925 13
Bulletin #889, U. S. Department of Labor (1945).. 28
Bulletin #869, U. S. Department of Labor (1946).. 29
Bulletin #53, U. S. Department of Labor (1941)... 29
Federal Employees' Compensation Act, 5 U. S. C. 757, sub. (b) October 14, 1949 Amendment.....13, 20, 21
Federal Employees' Compensation Act of May 30, 1908, 35 Stat. 556 19
Federal Employees' Compensation Act of March 11, 1912, 37 Stat. 74, extending the 1908 Act 20
Law Quarterly Review, Oxford, England, July, 1946, Volume 62 30
Rhodian Sea Law 12, 13

Supreme Court of the United States

October Term, 1958

No. 429

—o—

JAMES S. PATTERSON, General Administrator for Mobile County, Alabama, etc., LEONARD LESTER SULLIVAN, MELVIN A. HAYS, *et al*,

Petitioners,

against

UNITED STATES OF AMERICA.

—o—

BRIEF FOR PETITIONERS

This is a consolidated appeal in the five above-named actions involving common questions of law.

Statement of Facts

(1) James S. Patterson, as Administrator of the Estate of Edgar A. Doody, Jr., filed a libel on July 30, 1947, to recover for the wrongful death of the intestate on August 1, 1945 (A. 2a). Decedent was a machinist employed by the Mechanical Division of the Panama Canal, an unincorporated agency of the United States, as a shore employee. Doody was ordered to board the SS. HANGING ROCK, operated for the War Shipping Administration by War Emergency Tankers, Inc. He was ordered to check and adjust the speed of the forward feed pump turbine in the lower engine room. In the presence of a ship''s officer he commenced his duties. The aforesaid ship's officer started up the turbine, and immediately parts of the governor mechanization broke from the turbine rotor, struck Doody on the left side of his head rendering him unconscious and causing

his death. It is alleged that the machinery was in all respects defective and deceased was caused to suffer injuries and death by virtue of the said defective machinery which broke loose without warning (A. 18a-21a).

Decedent was 33 years of age at the time of his death.

(2) Libelant, Albert Vallebuona, filed a libel on February 23, 1954, for injuries sustained on March 10, 1952, while employed as deckhand with the Motor Vehicle Dispatcher, Cargo Traffic Division, on the Government Barge 6034, then at the Brooklyn Army Base, Brooklyn, New York (A. 65a). Libelant was assigned the duty of securing the aforesaid barge unaided when his foot became enmeshed in the securing line and was forced against the bitt and his said left leg was crushed, necessitating an amputation of his left foot and ankle (A. 61a).

(3) Libelant Melvin A. Hays filed a libel on December 21, 1953, to recover for illness, to wit: tuberculosis, sustained by him while a member of the crew of the SS. Missouri. Liability is predicated upon the existence of conditions aboard the steamship vessel, such as dampness, inadequate and insufficient heating, maintenance and supervision of quarters, and defective ventilating machinery (A. 40a-54a).

(4) Libelant Sterling Eugene Duncan filed a libel on June 29, 1953, to recover for illness, to wit: tuberculosis, sustained by him while employed as a fireman on the SS. Baton Rouge, managed and operated by the Inland Waterways Corporation. Liability is predicated upon the conditions existing aboard the aforesaid vessel, to wit: dampness, insufficient heating, inadequate maintenance and supervision of quarters and defective ventilating mechanisms (A. 33a-39a).

(5) Leonard Lester Sullivan filed a libel on June 29, 1953, for injuries sustained by him on May 4, 1952, while employed by Inland Waterways Corporation in the ca-

pacity of deckhand on board the SS. ILLINOIS, owned and operated by the Inland Waterways Corporation. Libelant had been breaking ratchets in the tow of barges and subsequently returned to the tug while carrying an ax in his hand. As he stepped aboard the vessel at night, and by virtue of the absence of any light whatsoever, libelant's foot was caught in a steel cable, negligently permitted to remain on the deck, creating a hazardous condition, causing him to be swung about and hurled to the deck striking both shoulders against rope coils. Libelant suffered severe injuries to his lower back and legs. Libelant was 21 years of age at the time of the accident (A. 7a-17a).

The VALLEBUONA libel involved a vessel in the public service of the United States and the other vessels were employed in the merchant service.

Libelant Patterson's intestate was a shoreside employee. Libelants Vallebuona, Hays, Duncan and Sullivan were all seamen (A. 19a, 7a, 33a, 4a, 55a).

In each action, respondent is liable by virtue of the negligence of its officers, agents, servants and employees, as well as by virtue of the manifest unseaworthiness of the vessels involved.

In each of the within actions exceptive allegations were filed and sustained, on the authority of *Johansen* v. *U. S.* and *Mandel* v. *U. S.*, 343 U. S. 427, 72 S. Ct. 849 and appeals therefrom duly taken.

Questions Presented On This Appeal

1. Is the United States of America so engaged in the operations of sea-going vessels, as to be chargeable with the consequences of its faults resulting in personal injuries to its employees injured aboard said vessels, in the same manner, and to the same extent, as a private shipowner or ship operators under similar circumstances?

2. Whether or not the vessel used or employed as merchant vessels are subject to the same rule of law as those vessels employed as public vessels?

POINT I

The United States is liable in the operation of vessels to the same extent as a private shipowner with regard to personal injuries sustained by its employees.

The courts below have relied upon *Johansen* v. *U. S.* and *Mandel* v. *U. S.*, 343 U. S. 427, 72 S. Ct. 849, in sustaining the exceptive allegations. The courts felt constrained to follow the aforesaid decisions construing them as holding the remedy under the Federal Employees Compensation Act an exclusive remedy in actions for personal injuries by government employees injured on government vessels, although as hereinafter set forth, both involved public vessels as distinct from merchant vessels.

However, it is the contention of the appellants that circumstances have so changed since the *Johansen* and *Mandel* decisions as to require a reversal, and the adoption of the views expressed in the dissenting opinion. The progress of shipping, both of merchant and public vessels demonstrate conclusively that the views expressed in the aforesaid dissenting opinion more adequately meet the needs of present day public and private shipping.

It is common knowledge, of which judicial notice must be taken, that to an increasing extent the United States has been utilizing the vessels owned and controlled by it, in commercial service. The United States is operating vessels in the same fashion as private steamship company operators and is in direct and continuous competition with such private shipowners. The adoption of the majority view in *Johansen* and *Mandel* creates a condition of distinctly unfair competition as against the private shipowner whose

very existence is essential to the existence and continuance of a sound Merchant Marine so necessary to national defense.

Experience indicates that not merely is there created such a condition of unfair competition aggravated by such a view, but also such doctrine destroys the uniformity in admiralty practice, so long highly regarded as the ideal and principle upon which American Admiralty Law is based. It is hornbook law that such uniformity is an essential concept which the courts will enforce.

The granting of rights to persons injured aboard privately owned vessels not granted to those similarly injured on vessels of the United States, although in identical capacities, destroys this uniformity and is repugnant to American judicial concepts. This is particularly true in times of expanding governmental use of vessels carrying commercial cargoes.

It is a factual matter that seamen are employed for a period of time only and frequently just briefly on a particular vessel, and often are not aware of the particular ownership of a particular vessel on which they may be serving. It is entirely incongruous to hold that his rights are to be determined by the fortuitous circumstance of ownership of the vessel. It is particularly so when he is employed one day on a privately owned vessel and on the next on a government owned one.

The fact that changing circumstances continually require restatement and reexamination of principles, particularly in the Maritime field is shown by the fact that the Federal Employees Compensation Act, 5 U. S. C. 751 et seq., enacted in 1916 was followed by the Jones Act, 46 U. S. C. Sec. 688 et seq., the Suits in Admiralty Act, 46 U. S. C. Sec. 741 et seq., and the Public Vessels Act, 46 U. S. C. Sec. 781 et seq., all designed for expanding needs, and, in addition thereto, the Compensation Act itself was amended in 1949 with a specific exemption for seamen.

The United States Supreme Court has frequently stated that where circumstances are so altered that a reversal of a prior decision is justified to meet changing events, the Court will not hesitate to reverse itself.

> *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783, 69 S. Ct. 1317.

In view of the aforesaid, it is respectfully submitted that the aforesaid dissenting opinion in the *Johansen* and *Mandel* cases (*supra*) be adopted.

In that opinion it was stated:

> "The Court, as it must, concedes that these actions are properly brought if the 'literal language' of the Public Vessels Act be adhered to"
>
> * * *
>
> "The Court's holding is as unique as the reasoning behind it. Time and time again during the last thirty years other federal courts have allowed injured employees to take their pick-receive compensation benefits, or sue for damages under the Public Vessels or some other Act.* Moreover, the Court gives the Government precisely what Congress, after debate, refused to give in 1949. Government representatives then asked Congress to make the Compensation Act 'exclusive, and in place of all other liability of the United States.' The House yielded

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* "See e.g., Johnson v. United States, 4 Cir., 186 F. 2d 120. In Gibbs v. United States, D. C., 94 F. Supp. 586, 588-589, District Judge Goodman said: 'From a review of court decisions, it can be categorically stated that no federal court decision, other than the case of Posey v. Tennessee Valley Authority, 5 Cir., 1937, 93 F. 2d 726, has ever held that the FECA affords the exclusive remedy to federal employees. To the contrary, it has been specifically held that the FECA does not bar suits by federal civilian employees against the Panama Railroad, or against the United States under the Federal Control Act of 1918, under the Suits in Admiralty Act, under the Public Vessels Act and under the Federal Tort Claims Act.'"

to this request. The House Report favoring the change stated that when the Compensation Act was enacted in 1916 a 'provision making the Compensation remedy exclusive apparently was then not deemed by the Congress to be necessary.'** The Report also stated that such a provision was now needed because of acts such as the Public Vessels Act which 'in general terms' authorize the bringing of damage suits against the Government. The Senate refused to grant the Government's request and prevailed upon the House to accept the present provision of the Act which states that: 'Nothing contained in this Act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel.' This Senate modification of the Bill, as it had passed the House, was offered by Senator Morse and accepted by Senator Douglas who was in charge of the bill. In offering this modification, Senator Morse said: 'Under existing law, Government-employed, seamen have been accorded the right to assert their maritime rights against the United States under the Suits in Admiralty Act and Public Vessels Act * * *.' 'I feel they should not be deprived of benefits they have enjoyed for many years without opportunity to have their arguments carefully considered by the appropriate committees of the Congress * * *.' 95 Cong. Rec. 13608. Senator Douglas agreed to the modification, stating that 'The primary consideration for accepting the Senator's amendments preserving the maritime rights and other statutory remedies of seamen is the fact that no hearings were held, no arguments were heard, and no discussion was had on this aspect of the pending bill.' 95 Cong. Rec. 13609.

I do not think this Court should deprive these seamen of rights which the Congress of 1925 gave them and the Congress of 1949 refused to take away." (pp. 858-859).

* * *

** "H. R. Rep. No. 729, 81st Cong., 1st Sess. 14."

POINT II

Government employees injured aboard vessels utilized in the merchant service may recover under the Suits in Admiralty Act and are not relegated to compensation as exclusive remedy.

The decisions in the *Johansen* and *Mandel* cases (*supra*) apply specifically and solely to vessels utilized as public vessels as distinguished from merchant vessels. The Court definitely pointed out that not merely did the injuries occur on public vessels but also affirmed a remand in one case for the introduction of evidence as to whether or not the vessel was a "merchant vessel". (see note 1). The Court further set forth the question in the case as being whether or not the benefits available to a seaman under the Compensation Act precluded suit for damages under the Public Vessels Act and commenced its inquiry from the premise that there was no remedy by way of damages under the Suits in Admiralty Act inasmuch as merchant vessels were not involved.

The case of *Inland Waterways Corp.* v. *Doyle*, 204 Fed. 2d 874 specifically affirmed this distinction and squarely held that the Federal Employees Compensation Act does not provide an exclusive remedy for injury aboard a merchant vessel. The Court distinguished the *Johansen* and *Mandel* cases on the specific ground that the aforesaid cases involved a public vessel and did not apply where the vessel in suit was a merchant vessel. Specific language of the Supreme Court in that decision was referred to by the Eighth Circuit as confirming the essential validity of the distinction.

In said case the Court said at page 877:

> " * * * There are, however, a number of statements in the opinion which indicate that the Supreme Court

> thought that the rights and remedies of such seamen depended upon whether the vessel upon which they were employed was a 'public vessel' or a 'merchant vessel'."

Thereafter, the Circuit Court pointed to portions of the Court's opinion which drew a distinction between seamen on public and merchant vessels and concluded on page 878:

> "Four of the Justices dissented in the Johansen case, and it seems reasonably apparent that the Justices who joined in the majority opinion were of the view that civilian seamen on a merchant vessel owned by the United States were not precluded by the Federal Employees' Compensation Act from electing to sue under the Suits in Admiralty Act for personal injuries received in the line of duty as the result of negligence."

This observation is sound inasmuch as the vessels employed in the merchant service more directly compete with private shipowners and the principle of the necessity of uniformity and of unfair competition would more necessarily require that the seamen of merchant vessels be treated in precisely the same fashion, whether employed on private or government vessels.

The distinction between publicly and privately employed seamen is legally unsound as it does not carry out the intent of Congress.

Congress by successive legislative enactment has directed that the United States Government shall have no sovereign immunity against Maritime tort claims and that no distinction should be made between the rights of seamen injured on government owned or privately owned vessels, or used by the Government as merchant or public ships.

Someone, in one of the government bureaus invented a legal technical device whereby the remedial benefits granted by Congress are sought to be destroyed.

Dean Roscoe Pound vividly portrays the unconscionable consequences attending such evasion of congressional intent.[1] He has quoted from the opinion in the case of *Cowan v. Inland Waterways Corporation*, 121 F. S. 683, pointing out that catastrophic injuries are not compensable under the Compensation Act except to the extent of frac-

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[1] Roscoe Pound was dean of Harvard Law School for twenty years, recipient of honorary degrees from seventeen or more universities, author of numerous books and hundreds of articles. He was an outstanding leader in International Congress of Comparative Law in France and a lecturer in India and Sweden.

In 1953 he assumed the duties of editor-in-chief of the NACCA Law Journal devoting his full time to the study and analysis of legal and social problems inherent in personal injury claims.

Cowan v. *Inland Waterways Corp.*, 121 F. Supp. 683 (United States District Court, Eastern District of Illinois, March 13, 1954), per Wham, Chief Judge.

Comment by Dean Pound: "Those who are inclined to object to the activities of lawyers who represent injured persons should reflect upon this case. Here a deck hand who since the date of the injury has been totally and permanently disabled from performing any useful or remunerative employment, is unable to talk plainly or coherently, comprehends very slowly and with great difficulty what is being said to him and is unable to answer questions until after long thought and then very slowly and only in part, who has suffered serious impairment of body and mind, has undergone personality changes, is subject to seizures in the nature of epilepsy which affect the right side of his body and result in loss of consciousness, and since receiving the injury has changed from an ordinarily healthy happy, gregarious individual to a person who is weak, inactive, morose, irritable and depressed, who as a result of the injury suffers from a severe aphasia and from post-traumatic epilepsy with impairment of memory and intelligence, was induced by government agents to sign away his rights in ignorance of them. Had it not been for the lawyers who advised him to return the checks and sue in admiralty, he would have lost the $85,000 "fair and just additional compensation" to which the judge found him entitled (Roscoe Pound—NACCA Law Journal, Vol. 15, p. 274).

tional parts of the wages, and to some extent for amputations, loss of use of a member of the body and death.

According to the opinion by the Court in the *Cowan* case, *supra*, at page 686, the libelant received the following:

> "From September 5th, 1950 to February 7th, 1951, over five months $623.28. Provision for future maintenance at $28.06 per week."

The Court points out at page 689 that the actual loss of earnings was $4,904 per annum, and finds that reasonable compensation for this seaman's injuries is $85,000.

If the decision in the *Johansen* and *Mandel* cases, *supra*, is permitted to stand, it would have the effect of depriving a seaman of his rights and remedies, as demonstrated by the decision in the *Cowan* case, *supra*.

A seaman who has been earning approximately $80 per week, after negligently being crippled for life, is denied any redress for his disability, pain and suffering and is allowed a fraction of his lost earnings.

This Court, having declared that it has the duty to fit the *Public Vessels Act, supra*, as intelligently and fairly as possible into the entire statutory system of remedies against the Government, to make a workable, consistent and equitable whole, cannot in fairness or justice, by reverting back to our feeble legal product of 1916, nullify the intent of the subsequent succession of progressive and civilized Congresses of the United States.

An award for only partial benefits or no award at all is seldom upset for the obvious reason the claimant does not have the benefit of counsel and a decision based on factual findings is not reversible.

A widow receives but 45% of the monthly pay of her deceased husband; if she has a child she gets but 40%, however, each child does gets 15% (Section 760).

In the event of injury, the greatest allowance is for the loss of an arm, which is 312 weeks compensation (Section

755). There is a further reduction provided by Section 753, which limits compensation to 66⅔% of the monthly pay during the period of total disability.

Under Section 756, subd. (b) sub-section (2), there is a further limit of $50.00 per month while an injured person is undergoing vocational rehabilitation.

The maximum and minimum monthly payments under Section 756, subd. (c) are from $112.50 a month to $525.00 a month.

The United States put aside its sovereign armor against maritime tort claims in 1920 and further in 1925, granting redress beyond any benefits of the *Federal Employees' Compensation Act of 1916, supra,* and granted remedies which had not been provided for by said Act.

By the factually untruthful and arbitrary expedient of misnaming a seaman and miscalling him a "civilian employee", the power of the mortmain of 1916, the *Compensation Act, supra,* becomes a weapon of destruction for the purpose of nullifying all rights and remedies granted by Congress in 1920 by the *Suits in Admiralty Act, supra,* and then again in 1925 by the Public Vessels Act, *supra,* which remedies were not encompassed by the provisions of the 1916 Compensation Act, *supra.*

Seamen, whose duties and risks are never changed, are arbitrarily mislabeled "civilian employees" for the sole purpose of nullifying substantial, complete and just remedies granted by Congress and restricting them to fractional and limited recovery, contrary to the benefits expressly provided for in the clear and unequivocal language of the *Suits in Admiralty Act* and the *Public Vessels Act.*

There is no more justification for presently reverting back to the 1916 Compensation Act, *supra,* than there would be to revert back to the Rhodian law which provided medi-

cal bills and a limit of ten pieces of gold for a hernia or twelve pieces of gold for the loss of an eye, etc.[2]

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[2] Sir Travers Twiss (1809:1897), Advocate-General to the British Admiralty, in his four-volume quarto of The Black Book of the Admiralty, published by Longmans, London, 1871-76, as The Black Book, traces, in addition to ecclesiastical law, the medieval sea codes.

The ancient version of the Rhodian Sea Law is contained in the treatise by Walter Ashburner of the London Bar (Oxford University Press (1909), followed by the Byzantinum of Norman H. Baynes and H. St. L. B. Moss, experts on the Byzantine period (Oxford, 1948).

Maritime law has steadily sought the goal of uniformity throughout the world and more than any other law has kept pace with civilization from the days of William the Norman landing at Pevensey Beach in 1066.

The first comprehensive approach to alleviate human suffering resulting from industrial and commercial accidents was the law of Great Britain in 1880, prior to which time the doctrine of "violenti non fit injuria" avoided the consequences of a tort feasor's negligence and destroyed an injured workman's right to damages on the basis that he expressly or impliedly agreed to accept the risk.

Ever since Bismarck first evolved the idea of workmen's compensation, which provided fractional, partial and limited redress to the personal injury victims of industry and commerce, civilization has endeavored to improve the plight of such victims by giving them fair, just and adequate financial redress for the damages suffered by such victims.

The benefits throughout the world have steadily improved since the *British Workmen's Compensation Act* of 1897 which lasted until 1904, when, on the report of the Departmental Committee, the compensation for injuries to workmen formed the basis for the *British Compensation Act* of 1906, repealing the Act of 1897.

The committee known as The Holman Gregory Committee endeavored to improve the compensable system of law for personal injury victims, which resulted in the Consolidating Act of 1925, which embodies the present-day principles of the compensation law of Great Britain.

The Workmen's Compensation Acts of Great Britain provide alternative remedy, and the Employers' Liability Act does not prevent the bringing of an action at common law.

The United States bottomed its 1916 Compensation Act on the then existing compensation acts of Great Britain.

Ever since the State of Georgia in 1855 enacted the first compensation law in the United States, and the State of Maryland in 1902

Mr. Justice Reed in the case of *American Stevedores Inc.* v. *Porello*, 330 U. S. 446, 67 S. Ct. 847, 91 L. Ed. 1011, stated as follows at page 851:

> "The passage of the Suits in Admiralty Act, the Public Vessels Act, and the Federal Tort Claims Act attests to the growing feeling of Congress that the United States should put aside its sovereign armor in cases where federal employees have tortiously caused personal injury or property damage. To hold now that the Public Vessels Act does not provide a remedy against the United States for personal injuries would in the future only throw this form of maritime action under the Federal Tort Claims Act: * * *."

See also:

Canadian Aviator, Ltd. v. *United States*, 324 U. S. 215, 65 S. Ct. 639, 89 L. Ed. 901.

See footnote 15 at page 851 American Stevedores, *supra*.[3]

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and the State of Montana in 1909, endeavored to substitute compensation for common law liability, the state courts held such acts unconstitutional. The 1910 compensation law of the State of New York was also held unconstitutional in 1911..

Ives v. *So. Buffalo Ry. Co.*, 201 N. Y. 271.

The first permanent compensation law which covered only certain classes of government employees, was passed in 1908. At the time when the *Federal Compensation Act* was passed, the generally established compensation laws accepted the elective pattern. The employee then had the right, which he does not have since the *Johansen and Mandell* cases, *supra*, to choose between common law and compensation remedies.

[3] See also: *Bailey* v. *Central Vermont Ry.* (1943), 319 U. S. 350, 63 S. Ct. 1062; *Tiller* v. *Atlantic Coast Line R. Co.* (first appeal) (1943), 318 U. S. 54, 58, 64, 63 S. Ct. 444 (second appeal) (1945), 323 U. S. 574, 65 S. Ct. 421; *Tennant* v. *Peoria P.U.R. Co.* (1944), 321 U. S. 29, 64 S. Ct. 409; *Lavender* v. *Kurn* (1946), 327 U. S. 645, 66 S. Ct. 740; *Lavender* v. *Kurn* (1946), 327 U. S. at 653, 66 S. Ct. at 740.

This Court has repeatedly held that none of the aforesaid acts, and that of course includes the Compensation Act of 1916, are to be regarded as an exclusive enactment, treating related situations in isolation, but are to be considered in *pari materia* with all of the other aforementioned Acts, constituting manifestations of a single larger purpose, jointly forming a national system for just and adequate compensation for the damages caused by tortious maritime acts.[4]

This view has uniformly and frequently been expressed by this Court, substantially in the following language set forth in the case of *Johansen* v. *United States*, 343 U. S. 427,

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[4] So the only pertinent comments follow, 66 Cong. Rec. 3560.

"Mr. Robinson: I think the Senator from Delaware should state briefly to the Senate the effect of the bill. It seems to be a measure of considerable importance.

"Mr. Bayard: Mr. President, the Senator from Arkansas is quite right; it is a measure of great importance. There are continuous applications being made to the Claims Committee of both Houses for the consideration of bills to reimburse people who have suffered damages from maritime accidents in which United States vessels are concerned, to enable them to present their suits in the various district courts. In this last Congress there were nearly 200 such claim bills introduced in the two Houses.

"* * * It would give a person aggrieved because of an accident by reason of the shortcomings of a United States ship the right to go into a district court and prosecute his action. It provides for the appearance of the Attorney General of the United States, and all maritime accident of any kind resulting from the collision and so on, are taken care of. A great deal of money would be saved to the government.

"Incidentally, the bill would accomplish something which should have been done in this country a long time ago. It would give an opportunity to do justice when Federal employees have committed an offense against an individual. * * *

"Mr. Robinson: If enacted, it would relieve Congress of the consideration of a great many measures in the nature of private claims.

"Mr. Bayard: All claims of this nature."

72 S. Ct. 849, at page 853 (together with *Mandel, Admx.* v. *United States*):

> "Under these circumstances, it is the duty of this Court to attempt to fit the Public Vessels Act, as intelligently and fairly as possible, 'into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole.' Feres v. United States, 340 U. S. 135, 139, 71 S. Ct. 153, 156, 95 L. Ed. 152."

Congressional intent, is made crystal clear by Mr. Justice Jackson joined by Mr. Justice Black and Mr. Justice Frankfurter in the dissenting opinion in the case of *Dalehite* v. *United States of America*, 346 U. S. 15, 73 S. Ct. 956, at page 975:

> "Congress has defined the tort liability of the Government as analogous to that of a private person. Traditionally, one function of civil liability for negligence is to supply a sanction to enforce the degree of care suitable to the conditions of contemporary society and appropriate to the circumstances of the case. The Civil damage action, prosecuted and adjusted by private initiative, neither burdening our overworked criminal processes nor confined by the limits of criminal liability, is one of the law's most effective inducements to the watchfulness and prudence necessary to avoid calamity from hazardous operations in the midst of an unshielded populace.
>
> Until recently, the influence of the Federal Government has been exerted in the field of tort law to tighten liability and liberalize remedies." * * *

Further at page 980:

> " * * * The Government, as landowner, as manufacturer, as shipper, as warehouseman, as shipowner and operator, is carrying on activities indistiguishable from those performed by private persons. In this area there is no good reason to stretch the legislative text to immunize the Government or its offi-

> cers from responsibility for their acts, if done without appropriate care for the safety of others. Many official decisions even in this area may involve a nice balancing of various considerations, but this is the same kind of balancing which citizens do at their peril and we think it is not within the exception of the statute.
>
> The Government's negligence here was not in policy decisions of a regulatory or governmental nature, but involved actions akin to those of a private manufacturer, contractor, or shipper." * * *

Judge Harlan in the case of *Dixon* v. *United States of America*, 219 F. 2d 10, has traced the progress of Admiralty law from 1902 to 1955 showing the enlightened progress of judicial decisions in treating with persons injured aboard seagoing vessels.

POINT III

The burden of determining whether or not a United States Government owned vessel was a "merchant vessel" or a "public vessel" destroys uniformity of decision in Admiralty law and raises a problem which just cannot be met as a matter of fact.

When *Johansen* and *Mandel* v. *United States* cases, *supra*, were argued, no one called the attention of this Court to the fact that if the *Federal Employees' Compensation Act* provided the exclusive remedy against the United States, that such holdings would revoke substantial parts of the remedies provided by Congress at a later date by the provisions of the *Suits in Admiralty Act, supra*, and the *Public Vessels Act, supra.*

Our courts are interpreting the concepts of negligence in an effort to advance beyond that which Mr. Justice Frankfurter in the case of *Urie* v. *Thompson*, 337 U. S. 163, 69 S. Ct. 1018, called "an antiquated and uncivilized basis for working out rights". Such purpose would be de-

stroyed if rights and remedies provided by an enlightened Congress were to be made ineffectual by decisions nullifying such Congressional intent and reverting to the limited benefits provided by the *Compensation Act, supra.*

The historical manifestations of advancing civilization and comprehensive understanding of fair and human treatment of personal injury victims and the desire of civilized nations to provide some redress against disastrous consequences of negligent acts is clearly demonstrated by our Congressional approach and treatment of these problems.

The ghost of the doctrine of "*volenti non fit injuria*" has arisen to destroy a seamen's rights to damages for pain, suffering and financial loss under a new name "civilian employee".

The seaman is not consulted nor does he have the equal opportunity of contractual bargaining of the contract which unjustly and unrealistically labels him "civilian employee."

Realistically and factually, economic pressure and the need of making a living, coupled with the ever hopeful feeling that he would not be the victim of a maritime tort, is the basis for his accepting employment under fractional protection when working on a public vessel, as compared to his right to full indemnity in case of injury when working on a privately owned vessel.

In truth and in fact he does not volantarily agree to waive many of the substantial rights and remedies granted him by Cougress through the enactment of the *Suits in Admiralty Act* and the *Public Vessels Act, supra.*

It is this mislabelling of a seaman as "civilian employee" that destroys Congressional intent.

Congress has clearly and definitely stated that Federal Compensation Acts do not apply to seamen.

It appears that in spite of the clear and unequivocal language used by Congress, that some of our Courts have not carried out Congressional intent.

Our Courts have erroneously interpreted the *Federal Employees' Compensation Act*, 5 U. S. C. Section 757, subd. (b), which is the October 14, 1949 amendment, as being an exclusive remedy.

Congress has stated that this is not an exclusive remedy, insofar as masters and members of any vessel are concerned.

There does not seem to be any explanation and clearly no justification for interpreting that part of the Federal Employees' Compensation Act, which makes said Act exclusive, in a manner which violates its very meaning and intent.

Congress has stated that this Act shall be exclusive, but not insofar as seamen are concerned.

The part of this Act which our Courts have erroneously failed to take into consideration, reads as follows:

> "PROVIDED, HOWEVER, That this subsection shall not apply to a master or a member of the crew of any vessel." (Title 5, Section 757, subd. (b))

Congress has consistently excluded seamen from the provisions of all Federal Employees' Compensation Acts.

The present Federal Employees' Compensation Act is the Act of September 7, 1916, 39 Stat. 742, 5 U. S. C. A. 751, *et seq.* This Act is the comprehensive compensation act regarding all federal employees.

Prior to 1916, there were three compensation acts limited to specific federal employees. They are as follows:

> Act of May 30, 1908, 35 Stat. 556, covered workmen in manufacturing establishments, arsenals, or navy-yards, or engaged in the construction of rivers and harbor fortifications or in hazardous work under the Isthmian Canal Commission or on reclamation projects;

Act of March 11, 1912, 37 Stat. 74, extended the 1908 Act to employees engaged in hazardous work under the Bureau of Mines or the Forestry Service;

The Panama Canal Act of August 24, 1912, 37 Stat. 560, 48 U. S. C. A. § 1301 *et seq.*, authorized the President to provide compensation for all employees injured while working in connection with the Panama Canal or the Panama Railroad.

The *1916 Act* which is still in force was subsequently amended from time to time in details not pertinent to this inquiry. However, in 1949, for the first time, the remedy was by statute declared to be exclusive subject to exclusions hereinafter set forth. Until that time, there was no statutory enactment making the remedy exclusive.

The amendment of October 14, 1949 changed the existing Section 757, sub-section (a), by adding sub-section (b), which provided that said Act shall be exclusive.

As heretofore pointed out, this exclusive feature was specifically stated by Congress not to include the master or member of the crew of any vessel.

The significance of this amendment is particularly to be noted in view of the fact not stressed in the *Johansen* opinion that the proviso excluding masters or members of the crew is in the precise same sub-section which provided for the exclusivity of the remedy.

This is particularly important in view of Section 303(g) of the Act which provided for the retroactive effect of the 1949 amendment providing that "the amendment made by § 201 of this Act to § 7 under the Federal Employees' Compensation Act, making the remedy and liability under such Act exclusive except as to master or members of the crew of any vessel shall apply to any cause of injury or death occurring prior to the date of enactment of this act". Reference to the said § 303(g) indicates clearly particularly in the absence of commas that the exclusivity provision was

intended by Congress to exclude crew members. Furthermore, the Act also contained (63 Stat. 868, 5 U. S. C. 791-4) an additional overall provision regardless of the exclusivity provision, which states as follows:

> "§ 791-4. Applicability to seamen
>
> (a) Nothing contained in this Act shall be construed to affect the exclusion of certain seamen (as defined in section 1291 of Appendix to Title 50) from the terms of the Federal Employees' Compensation Act, as provided by section 1291 of Appendix to Title 50.
>
> (b) Nothing contained in this Act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel. Oct. 14, 1949, c. 691, Title III, § 305, 63 Stat. 868."

This showed an overall intent to exclude crew members.

The provisions in § 1291 of the appendix to Title 50 relate to seamen employed through the War Shipping Administration, which specifically excluded seamen so employed from the Federal Employee's Compensation Act and provided for their right to sue for damages.

Additional enactment indicating Congressional intent to regard seamen as *sui generis*, is shown in the Act known as the Longshoreman and Harbor Workers' Compensation Act. Further compensation law (Title 33, U. S. C. § 901, *et seq.*), (§ 902) part of the original Act of 1927 and as unamended to date, defines the word employee in subsection (3) thereof, "the term 'employee' does not include a master or member of a crew of any vessel nor any person engaged by the master to load or unload or repair any small vessel under 18 tons net". This defining statute, Act of March 4, 1927, 44 Stat. 1424, has been frequently construed and has never been amended.

The signing of articles or other contract which states that a person becomes a master or a member of the crew, cannot in law, in fact or in justice make such person more

of a seaman than another person doing the identical work, who signs a contract where such seaman is called a shore employee, instead of by his correct name, that of seaman.

The means whereby seamen working on Government vessels have been deprived of the rights accorded to other seamen doing identical work is by having such seamen designated "civilian employees".

We submit it is time to correct this injustice and to give to the expression of Congress its correct and honest meaning.

There is no justification for giving to words in ordinary usage interpretation contrary to its plain meaning.

The approach to personal injury damage claims on the basis of Workmen's Compensation has been progressive and necessary but does not provide an adequate remedy at the present time.

Said Act provided for partial redress in the event of death or total or partial disability and limited redress for the loss of a member or function of the human body.

Said Act made no provision and did not take into consideration the most serious elements of damage. No provision was made for compensation of permanent injuries, pain, suffering, impairment of earning power, loss of opportunity for advancement, injury to the central nervous system or for the loss of the differential of earnings between the actual loss of the injured person and the fractional amount allowed under the Act, etc.

This failure and inadquacy of remedy was corrected, insofar as seamen were concerned, by various acts.

On March 4, 1915, Congress enacted a Seaman's Welfare Act which was amended June 5, 1920, commonly known as the Jones Act, *supra*. The provisions of said Act extended to seamen the common-law right or remedy in cases of personal injury to railway employees. The same year, and on March 9, 1920, by enacting the Suits in Admiralty

Act, *supra*, Congress expanded seamen's rights to include actions against merchant vessels of the United States and five years later to include the same rights against Public Vessels.

After the decisions by the Supreme Court of the United States in 1917 in the cases of *New York Central Rail. Co.* v. *White*, 243 U. S. 188; *Hawkins* v. *Bleakly*, 243 U. S. 210, and *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, that Congress, in 1920, provided rights and remedies beyond the 1916 Compensation Act by enacting the *Suits in Admiralty Act, supra*, and five years later, by enacting the *Public Vessels Act, supra.*

This action of Congress did enlarge the remedies of seamen rather than restrict them or limit or give only fractional relief. This view is demonstrated by the amendment in 1939 of the *Federal Employers' Liability Act*, said act constituted the basis of the *Jones Act*, 46 U. S. C. 688, the *Suits in Admiralty Act, supra*, and the *Public Vessels Act, supra.*

The amendment of the Employers' Liability Act, 53 Stat. 1404; 45 U. S. C. sec. 51; Sec. Rep. No. 661, 76th Cong., 1st Sess. 2 (1939): "This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations." [5]

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[5] *Baird* v. *New York Cent. R.R.* (1949), 299 N. Y. 213, 86 N. E. (2) 567; *Ericksen* v. *Southern Pacific R.R.* (1952), 39 Cal. (2d) 374, 246 P (2d) 642, *Harris* v. *Missouri Pacific R.R.* (1944), 158 Kan. 679, 149 P (2d) 342, *Trucco* v. *Erie R.R.* (1946), 353 Pa. 320 45 A (2d) 20, *Albright* v. *Pennsylvania R.R.* (1944), 183 Md. 421, 37 A (2d) 870, *Pigque* v. *Baldwin* (1942), 154 Kan. 707, 121 P (2d) 183, *Shanks* v. *Union Pacific R.R.* (1942), 155 Kan. 584, 127 P (2d) 431, *Great Northern Ry.* v. *Industrial Comm'n* (1944), 245 Wis.

The uncertainty which now exists as to whether a seaman (unrealistically and improperly labelled "civilian employee") is entitled to the benefits of the *Suits in Admiralty Act, supra,* and/or the *Public Vessels Act, supra,* arises from the consideration of the nature of the cargo, rather than the nature of the employment.

The method of determining whether a particular employee was injured and killed in interstate commerce, which gave rise to many conflicting decisions, was cured by the expression of the intent of Congress in the amendment of the Employers' Liability Act, *supra,* by the 76th Congress.

The holding in *Pedersen* v. *Delaware, L. & W. R. Co.* (1913), 229 U. S. 146, 33 S. Ct. 648, laid emphasis on the word "commerce".

375, 14 NW (2d) 152, *St. Louis, S. F. Ry.* v. *Wacaster* (1947), 210 Ark. 1080, 199 SW (2d) 948, *Robinson* v. *Penn R. Co.* (1953), 113 F. Supp. 863, *Ford* v. *Louisville, etc. R.R.* (1946), 355 Mo. 362, 196 SW (2d) 163.

A repairman working in the back shop on locomotives and their various parts which had been withdrawn from service for major overhauls and repairs; a tie inspector who went to the premises of a lumber company to inspect ties and determine whether his employer railroad would buy them and use them later in an interstate roadbed; an employee loading barrels of oil to be used in filling railroad lanterns and machines; a blacksmith's helper engaged in making locomotive parts; a guard at terminal; an employee whose duty it was to clean up papers and other debris around the depot and the railroad tracks; a flood control worker whose duty it was to fill sand bags and place them on a flat car which took them to where they were needed to protect the tracks from existing flood waters; a laborer around certain ore docks, who served as a guard during the months of October to May when they were not in use or service of any kind, although they were used for interstate commerce from May to October; a rodman who was a member of a surveying crew and who spent about 50 per cent of his time in interstate operations even though he was at the time of the accident engaged solely in intrastate work; and a carpenter who ordinarily worked on railroad bridges carrying interstate commerce but who was employed at the time of the accident, and for two months before, on a bridge carrying solely intrastate traffic.

In the case of *Shanks* v. *Delaware, L. & W. R. Co.* (1916), 239 U. S. 556, 36 S. Ct. 188, Congress interpreted the test of employment on a more restrictive measure, that is, whether the employee at the time of injury was "engaged in interstate transportation or in work so closely related to it as to be practically a part of it."

Congress expressed its disagreement with this artificial distinction by stating in the Act of 1939, *supra*, that the basis of an employee's right to sue for damages depended on whether or not "any part of whose duties" shall be in the furtherance of interstate commerce, "or shall, in any way directly or closely and substantially, affect such commerce."

It is, therefore, crystal clear and beyond any honest suggestion to the contrary, that it is the nature of the work and not the labelling, artificial, unrealistic designation by the employer, or the nature of the employer's business or activities that determines the right of an injured employee to the benefits created by Congressional enactment.

This liberal intent of Congress not only is clearly demonstrated by its own unequivocal language, but is supported by the interpretation of the cases considered by the Supreme Court of the United States since the *Shanks* case, *supra.*

The liberal trend of Congressional intent in providing full and adequate remedy and redress as recognized in *Tiller* v. *Atlantic Coast Line R. Co., supra; Bailey* v. *Central Vermont Ry., supra; Tennant* v. *Peoria P.U.R. Co., supra; Lavender* v. *Kurn, supra,* and *Stone* v. *New York, C. & St. L. R. Co.* (1953), 344 U. S. 407, 73 S. Ct. 358, reversing (Mo. Sup. 1952), 249 S. W. (2d) 442 is not limited to railroad torts.

In view of the uniformity of recent decisions eliminating technical, theoretical and unrealistic distinctions in Admiralty causes, there seems to be no justification for

the existence of a distinction as to the liability of a vessel carrying one type of cargo from that of a vessel carrying another type of cargo of a Government vessel carrying the same cargo as a private ship.

Seas Shipping Co. v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872; *Rogers* v. *United States Line Company*, 205 Fed. 2d 57, 347 U. S. 984, 74 S. Ct. 849; *Pope & Talbot* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202; *Petterson* v. *Alaska S.S. Co.*, 205 Fed. 2d 478, aff'd 74 S. Ct. 601; 347 U. S. 396, rehearing denied, 74 S. Ct. 848, 347 U. S. 994; *The Osceola*, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760.

The same argument applies with equal force to the absence of any justification for making a distinction between one seaman and another, injured under identical circumstances and during the performance of identical services, by the mere expedient of designating the seaman as a "civilian employee".

No one can honestly deny that the sole purpose of utilizing the term "civilian employee" to a shipworker performing the work traditionally performed by seamen, is to reduce the amount of the Government's damages to a sum less than that which a private shipowner would be liable for under similar circumstances.

It is common knowledge that the United States of America is engaged in the business of merchant shipping, carrying cargo of a public and private nature interchangeably and simultaneously, differing on the same ship from trip to trip.

It is unrealistic and burdensome, if not impossibility of performance to require a personal injury victim to know or ascertain the fortuitous nature of a ship's cargo on a particular trip. To impose such knowledge as a condition precedent for predicating a civil action on a maritime tort is confiscatory of rights granted by Congress under the Suits in Admiralty Act, *supra*, the Public Vessels Act, *supra*, for such information is not available to him.

It is repugnant to our American concept of justice to even entertain the suggestion that Congress granted to a class of employees engaged in commerce by rail greater benefits than to those engaged in commerce by ship.

Congress has decreed that the United States when engaged in the business of maritime shipping is liable for the consequences of its maritime torts to the same extent as any private shipowner. Suits in Admiralty Act, *supra*, Public Vessels Act, *supra*.

The United States Government has gone into the business of merchant shipping. Its legal department through its Maritime Division has endeavored to nullify Congressional waiver of sovereign immunity by limiting its liability to a fraction of the damages for which a private shipowner would be held liable under similar circumstances, through the legal legerdemain and arbitrary mislabelling of a seaman as a "shoreside employee".

By this method, ancient and confiscatory methods have been invoked to utilize unrealistic values in measuring present day personal human catastrophe and to reduce to a fraction and revoke and otherwise limit substantial benefits granted by Congress in clear and unequivocal language.[6]

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[6] Samuel B. Horovitz (Harvard A.B., LL.B., 1922), author of Practice and Procedures under the Massachusetts Workmen's Compensation Law (1930), and of Horovitz on Workmen's Compensation (1944). For many years Workmen's Compensation attorney for the Boston Legal Aid Society and the Massachusetts State Federation of Labor, Associate Member of the International Association of Industrial Accident Board and Commissions, Editor-in-Chief, NACCA Law Journal. Contributor of many articles on workmen's compensation to law journals. Lecturer on Workmen's Compensation, Howard Law School, Washington, D. C., Simmons College, etc.

Horovitz at NACCA, Volume 3, page 16, referring to recipients of compensation awards says: "And even if he wins his compensation case he all too often discovers that the amounts specified in the compensation law are today so low and limited that he eventually becomes a public charge. For example, in many states, loss of both

legs or both eyes or both arms bring payments of less than $12,000.00 payable in below-subsistence weekly rates of $20.00 to $25.00 weekly, even for laborers with large families * * *. For the seriously injured worker this great social insurance has become a veritable nightmare."

Samuel B. Horovitz demonstrates in his footnotes in the NACCA Law Journal, Vol. 3, pages 25 to 30 inclusive, that where compensation is the exclusive remedy, the injured worker stands 60% of the loss, that is, not taking into account pain, suffering, permanent injury and other disabilities not recognized under compensation law.

The early cases tended to be strict; but the later and modern trend was and is to construe the acts broadly and liberally, to protect the interests of the injured worker and his dependents. For that reason courts throughout the compensation-world refuse to follow narrow, older cases. Judges today realize that most acts arbitrarily cut down the individual worker's monetary opportunities for recovery by giving far smaller amounts than currently awarded in successful common law and other cases, and that even in successful compensation cases, the employee actually suffers the greater part of the financial load. Courts recognize that in close or borderline cases it is better to put part of the loss on the insurer, and hence on the ultimate consumer of the product or services, than wholly upon the injured employee or his family, who rarely can pay it and must pass it on to charity; that as one of the purposes of workmen's compensation was to keep injured workers from becoming public charges, a reasonable, liberal and practical construction is preferable to a narrow one, and that these acts are for the giving of compensation, not for the denial thereof. It is insurance of a social character, and not to be administered on narrow common-law principles applying to other types of insurance. Care must be exercised lest long judicial habits in tort cases allow judicial thought and opinion in compensation cases to be too much influenced by outmoded or modified factors of decision.

Furthermore, contrary to popular opinion, it is the injured worker, not the employer, who actually suffers the greater part of the financial load. Even in successful compensation cases the best estimate is that the worker stands at least 60% of the wage loss. This is due to many factors: (1) During waiting periods employees get no compensation whatever and carry that entire load. The great majority of injuries are, fortunately, for industry, of short duration (estimated at an average of 19 days in manufacturing)—see Bulletin No. 889, U. S. Dept. of Labor p. 1 (1945); (2) most acts provide that the weekly compensation shall be 42½ to 70 per cent of the weekly wages, with an additional limitation that the maximum weekly compensation payments shall not exceed a given amount, usually $15 to $25. An employee getting a wage of $80 weekly, and recovering

a maximum weekly compensation of $20, therefore stands $60 weekly of the loss, or 75 per cent of the wage loss; (3) similarly, many acts put a maximum limit on medical payments, some as low as $300, or not exceeding a given period of weeks—the entire excess falling on the employee.

The best available recent estimates is that actually the worker stands 60 per cent of the loss, as they receive "in the aggregate about 40 per cent of their wage loss, based upon wage earned before the injury. That is because we pay as compensation only a percentage of the wage which is lost * * * subject to a maximum wage basis," per Harry A. Nelson, director of Workmen's Compensation, Wisconsin Industrial Commission, Bull. No. 53 U. S. Dept. of Labor pp. 30, 31 (1941 Convention I.A.I.A.B.C.).

Seamen's unions and railroad unions feel they are better protected under existing federal tort laws than under proposed compensation acts—see Bulletin No. 869, U. S. Dept. of Labor, Work-Compensation and the Protection of Seamen (1946, 93 pages).

Furthermore, compensation legislation has not kept up with the depreciated value of the dollar, while courts and juries, unfettered by the need of legislation have, for that very reason, allowed increased verdicts. (See above cases in which some of the courts expressly took judicial notice of the value of the dollar.)

Canada; *Boxers* v. *Hollinger, et al.* (1946), 4 D. L. R., 186 (Ontario High Court), per Urquhart, J., discussing transportation as incident of employment, but upholding common law suit under the particular circumstances.

Industrial Commission of Ohio v. *Weigrandt*, 102 Ohio St. 1, 130 N. E. 38 (1921)—"that upon just and scientific considerations such injuries should be regarded as a charge upon the business upon which the employees are engaged" (horseplay held compensable).

Phil Hollenbach Co. v. *Hollenbach*, 181 Ky. 262, 204 S. W. 152 (1918) "should be charged to and absorbed by the business."

Post v. *Burger & Goldke*, 216 N. Y. 544, 553, 554, 11 N. E. 351, Ann. Cases 1916 B. 158 (1916).

Kansas City Fibre Box Co. v. *Cornell*, 5 F. 2d 398, 43 A. L. R. 478 (8 Cir. 1925)—Kenyon, Cir., J.: "Where machinery is destroyed, or injured in industry, it is a part of the burden of industry to supply or repair such machinery. Why should the same theory not apply as far as practicable, where human machinery is injured in carrying out the work? There is economic loss in both cases."

See Grason, J., in *Baltimore Steel Co.* v. *Burch*, 49 A. 2d 542, 544 (Md. 1946)—it was intended to relieve workers "from the hazards of industrial employment and to protect the public from the care and expense resulting from human derelicts due to accidents" in industry.

To "prevent injured workmen from becoming public charges" per Neil, J., in *Griffith* v. *Goforth*, 184 Tenn. 56, 195 S. W. 2d 33, 38 (1946).

Per Christianson, J., in *Thoresen* v. *Schmahl*, 222 Minn. 304, 24 N. W. 2d 273, 276 (1946)—literal construction not used when it results in absurdity or tragic incongruity; the broad and liberal construction is in the interest of workmen to carry out its policies.

Accord: Simmons, C. J., in *Clark* v. *Village of Hemingsford*, 147 Neb. 1044, 26 N. W. 2d 15, 22 (1947)—"liberally construed and its beneficent purposes not to be thwarted by technical refinement or interpretation."

Accord: Riner, C. J., in *In re Jensen* (*Jensen* v. *Manning & Brown Inc.*), 178 P. 2d 897, 900 (Wo. 1947)—"to be reasonably and liberally construed."

Accord: Moulton, C. J., in *Wilkins* v. *Blanchard-McDonald Lumber Co.*, 52 A. 2d 781, 783 (Vt. 1947)——"The Act is to be construed liberally to accomplish the humane purpose for which it was passed."

Accord: Hickman, C. J., in *Hood* v. *Texas Indemnity Ins. Co.*, 209 S. W. 2d 345 (Tex. 1948), reviewed in 2 NACCA Law Journal, 47-51 (Nov. 1948)—"should be liberally construed."

See Dodd, W. F., *supra*, pp. 687, 688, citing E. H. Downey (writing in 1920 or so): "* * * industry bears less than half of the direct monetary cost of work injuries. In Pennsylvania, New Jersey, Colorado, West Virginia, and other low benefit states compensation does not amount to one-fourth of the wage loss."

The industry and not the individual workman should, to a large extent, bear the burdens of accidents—*In re Jensen* (*Jensen* v. *Manning & Brown, Inc.*), 178 P. 2d 897, 900 (Wyo. 1947), per Riner, Ch. J.

Morgan, J., in *Goodyear Aircraft Corp.* v. *Industrial Commission*, 62 Ariz. 398, 158 P. 2d 511 (1945) charge against industry to the same extent as repairs to a broken machine.

Birchett v. *Tuf-nut Garment Manufacturing Co.*, 205 Ark. 483, 169 S. W. 2d 574, 577, 579 (1943)—policy is to put loss on "ultimate consumer" and not on employee. Should construe liberally for those "who toil for their daily bread".

R. Marvin Everett in the Law Quarterly Review, Oxford, England, July 1946, Vol. 62, page 300, 301, "certainly the higher tribunals both in England and in America seemed to have lived up to the dictum 'that this is an Act for the giving and not the withholding of compensation.'"

"It should be administered substantially as insurance of social character"—*Herbert* v. *Ford Motor Co.*, 285 Mich. 607, 610, 281 N. W. 374, 375 (1938).

Congressional intent clearly expressed and extensively interpreted by the Supreme Court of the United States, cries for the revocation of the barriers which have been asserted for the purpose of nullifying the benefits granted to seamen by Congress.[7]

One cannot escape the brilliant interpretation of the law by the late Judge Holmes, clearly expressing the intent of Congress to hold vessels engaged in public service liable for the consequences of maritime torts. *The Western Maid, The Liberty, The Carolinian*, 257 U. S. 419, 66 L. Ed. 299, 42 Sup. Ct. Rep. 159.

The applicability of maritime law on vessels owned by the Government, employed either for Government purposes or as merchant vessels, and the manner in which such law should be applied is stated by Judge Holmes in *The Western Maid, The Liberty, The Carolinian, supra.*

[Although liability could not be held, insofar as the tort antedated the waiver of sovereign immunity by the Government, the language is most instructive. Judge Holmes stated:]

> "But it is said that the decisions have recognized that an obligation is created in the case before us. Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp."

The dissenting opinion in said cases contains the following comments:

> "In Rounds v. Cloverport Foundry & Machine Co., 237 U. S. 303, 306, 59 L. ed. 966, 967, 35 Sup. Ct. Rep. 596, it is said, Mr. Justice Hughes delivering the opinion of the court, 'The proceeding in rem which is within the exclusive jurisdiction of admiralty is one essentially against the vessel itself as the debtor

[7] See NACCA Law Journal, vols. 3 and 4. "The Litigious Phrase 'arising out of employment' ", vol. 3, p. 15 and vol. 4, p. 19 et seq.

> or offending thing,—in which the vessel is itself "seized and impleaded as the defendant, and is judged and sentenced accordingly.'' ''

Judge Holmes further stated:

> "In deciding this question we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic over-law to which even the United States must bow."

Since the passage of the *Suits in Admiralty Act* and the *Public Vessels Act, supra,* the applicable law at the present time can be expressed in the language used in the dissenting opinion in *The Western Maid, et al., supra,* back in 1922, which appears as follows:

> "So again in Workman v. New York City, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212, where it is said, Chief Justice White delivering the opinion of the court, after an exhaustive review of cases, such as he usually gave, 'It results that, in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has jurisdiction.' In view of this it is difficult to understand how it can be said that there was nothing that case decided contrary to the conclusion in these cases."

Many federal Judges, universally acknowledged as authorities on Admiralty law, have consistently considered a vessel as an independent offending entity. These views, taken in conjunction with the expressions of Congress by the passage of the *Jones Act, supra,* the suits in *Admiralty Act* and the *Public Vessels Act, supra,* must lead to the inescapable conclusion that a ship and its owner, as a matter of justice and as a mandate of Congress, should be charged with the full and not patial consequences of its torts.

The following is a quote of footnote "1" in the case of *The Western Maid, et al., supra*:

> "The U. S. S. Hisko, U. S. S. Roanoke and U. S. S. Pocahontas (Circuit Judge Manton, S. D. N. Y.) (March 17, 1921, unreported opinion annexed to brief);
>
> The U. S. S. Newark (District Judge Knox, S. D. N. Y.) (March 18, 1921, unreported opinion annexed to brief);
>
> The U. S. S. Sixaola (District Judge Mayer, S. D. N. Y.) (April 21, 1921, unreported opinion annexed to brief);
>
> The F. J. Luckenbach, 267 Fed. 931; The Liberty, now before this court; The Carolinian, 270 Fed. 1011, also now before this court.
>
> Also: The Florence H., 248 Fed. 1012; The Gloria, 267 Fed. 929; The City of Philadelphia, 263 Fed. 234. Counsel also cites: The Tampico, 16 Fed. 491; Thompson Navigation Co. v. City of Chicago, 79 Fed. 984; Johnson Lighterage Co., 231 Fed. 365; The Attualita, 238 Fed. 909; The Luigi, 230 Fed. 493; The Othello, 5 Blatchf. 343."

Conclusion

Congress, by its amendment to the Federal Employers Liability Act in 1939, *supra*, declared that the test of availability of rights and remedies under said Act was to be governed by the nature of the worker's duties and not the employer's designation.

The Supreme Court of the United States has consistently held that related remedial acts will be considered in *pari-materia* to carry out Congressional intent.

The plain meaning of the 1949 Amendment of the Compensation Act excludes seamen from the provisions thereof.

This Court has fostered the view by repeated decisions that civilization demands a realistic and factual evaluation

of a seaman's personal injury claim and will not permit legalistic jugglery to deprive a seaman of any of his rights or remedies.

The realistic approach to the entire problem is summarized by Judge Learned Hand in the case of *Keen* v. *Overseas Tank Corporation*, 194 F. 2d 515, c.d. 72 S. Ct. 1061, 343 U. S. 966, cited with approval in *Boudoin* v. *Lykes Bros. Steamship Co.*, 75 S. Ct. 382, 348 U. S. 382.

In the *Keen* case, *supra*, the Court stated at page 518:

> "Substantially all maritime risks are insured, and if we must suppose that the addition of this risk will show in the premiums, in the end it will be likely also to show in freight rates; and so far as it does, the recovery will be spread among those who use the ships. As we have said, this has been the uniform practice when the injury has arisen from defects in material; and we have yet to learn that hull and gear are less likely to fail under stress than those who handle both."

Respectfully submitted,

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No. 429

In the Supreme Court of the United States

OCTOBER TERM, 1958

JAMES S. PATTERSON, GENERAL ADMINISTRATOR FOR MOBILE COUNTY, ALABAMA, AS ADMINISTRATOR OF THF ESTATE OF EDGAR A. DOODY, JR., DECEASED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
SAMUEL D. SLADE,
LEAVENWORTH COLBY,
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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	3
Summary of argument	9
Argument	13
I. This Court's determination in *Johansen* v. *United States*, 343 U.S. 427, that federal compensation benefits are the exclusive remedy for civilian employees of the Government, who are injured in the performance of duty as seamen on publicly-operated vessels employed in the public service, is equally applicable with respect to civilian employees of the Government who are injured in the performance of duty as seamen on publicly-operated vessels employed in merchant service	13
A. The *Johansen* opinion	14
B. The Eighth Circuit's *Doyle* opinion misinterpreted *Johansen*	18
II. The Compensation Act Amendments of 1949 did not evidence a congressional recognition that federal seamen who are entitled to compensation benefits also have a right of action against the Government	21
III. When Congress, for special reasons, has thought it desirable that seamen employed on Government vessels engaged in merchant service should have the right to sue the United States under the Suits in Admiralty Act, it has passed special legislation to that effect and prohibited such seamen from receiving compensation	25
Conclusion	30
Appendix	31

CITATIONS

Cases:

	Page
Aliotti v. *United States*, 221 F. 2d 598	17
Aubrey v. *United States*, 254 F. 2d 768	15
Berizzi Bros. Co. v. *S. S. Pesaro*, 271 U.S. 562	13
Calmar S.S. Corp. v. *United States*, 345 U.S. 446	16
Canadian Aviator, Ltd. v. *United States*, 324 U.S. 215	17
Compania Espanola v. *Navemar*, 303 U.S. 68	13–14
Cowan v. *Inland Waterways Corp.*, 121 F. Supp. 683	13
De Vos v. *United States*, 121 F. Supp. 514	25
Feres v. *United States*, 340 U.S. 135	15
Inland Waterways Corp. v. *Doyle*, 204 F. 2d 874	5, 9, 10, 11, 13, 18, 20, 21
Johansen v. *United States*, 343 U.S. 427	5, 6, 8, 9, 10, 11, 13, 14, 15, 18, 19, 20, 21, 22, 23–24, 25, 29
Lake Monroe, The, 250 U.S. 246	17
Lewis v. *United States*, 190 F. 2d 22	15
McMahon v. *United States*, 342 U.S. 25	18
Mejia v. *United States*, 152 F. 2d 686, certiorari denied, 328 U.S. 862	16
Olavarria & Co. v. *United States*, 56 F. Supp. 758	17
Panama Canal Co. v. *Grace Line, Inc.*, 356 U.S. 309	4
Peru, Ex Parte, 318 U.S. 578	14
Sasse v. *United States*, 201 F. 2d 871	25
Thomason v. *United States*, 184 F. 2d 105	16
United States v. *Babcock*, 250 U.S. 328	18
United States v. *Caffey*, 141 F. 2d 69	16
United States v. *Marine*, 155 F. 2d 456	10, 15, 18, 20
United States v. *Meyer*, 200 F. 2d 110	25
United States v. *South Buffalo R. Co.*, 333 U.S. 771	22
Wilder Manufacturing Co. v. *Corn Products Co.*, 236 U.S. 165	18

Statutes:

Act of July 8, 1946, Sec. 202, 60 Stat. 501	4
Act of September 26, 1950, 64 Stat. 1038	21
Canal Zone Code Title 2:	
Sec. 245, 62 Stat. 1076	21
Sec. 246(a), 62 Stat. 1076	4
Sec. 248(d), 62 Stat. 1078	21

Statutes—Continued

Page

Federal Employees' Compensation Act of 1916, 39 Stat. 742, 5 U.S.C. 751 ..... 2, 3, 4, 6, 7, 8, 9, 10, 14, 16, 17, 18, 19, 21, 22, 25, 26, 33
Amendments of October 16, 1949, 63 Stat. 854 ... 2, 21, 22, 33
Sec. 201 33–34
Sec. 302 34
Sec. 303 34
Sec. 303(g) 25, 34–35
Sec. 305(a) 35
Sec. 305(b) 35
Public Vessels Act of 1925, 43 Stat. 1112, 46 U.S.C. 781 ..... 2, 3, 5, 9, 10, 11, 14, 16, 17, 18, 21, 31–32
1939 Reorganization Plan No. II, §6, 53 Stat. 1434, 4 F.R. §2732 5
1950 Reorganization Plan No. 21, 15 F.R. 3178, 64 Stat. 1273 4
Shipping Act of 1916, 39 Stat. 728 ..... 17, 19
43 Stat. 360, 49 U.S.C. 151 5
Suits in Admiralty Act of 1920, 41 Stat. 525, 46 U.S.C. 741, *et seq* 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 21, 22, 28, 29, 31
10 U.S.C. 4745 21
10 U.S.C. 4747 21
46 U.S.C. 713 3
War Shipping Administration (Clarification) Act of 1943, 57 Stat. 45, 50 U.S.C. App. 1291 .. 4, 12, 25, 29, 36–37

Miscellaneous:

Comment, *Responsibility of the United States on Maritime Claims Arising out of the Operation of Government-Owned Vessels*, 39 Yale L. J. (1930), 1189 17
58 Cong. Rec. 7317 17
95 Cong. Rec. 13609 24
95 Cong. Rec. 14060 24
House Merchant Marine and Fisheries Committee, 77th Cong., 2d Sess., Hearings on H.R. 7424 (September 2, 1942):
p. 6 ..... 27, 28
p. 14 ..... 26, 27

Miscellaneous—Continued

	Page
H. Rept. No. 223, 66th Cong., 1st Sess., pp. 1–3	17
H. Rept. No. 497, 66th Cong., 2d Sess., pp. 3–4	17
H. Rept. No. 107, 78th Cong., 1st Sess., p. 34	27
2 Larson, *Workmen's Compensation Law* (1952), §65.00	15
Note, *The Maritime Liability of the United States*, 100 Univ. Pa. L. Rev. (1952), 689	17
Note, 14 N. Car. L. Rev. (1936) 199	15
Prosser, *Torts* (1941), p. 543	15
S. Rept. No. 223, 66th Cong., 1st Sess., pp. 1–3	17
Schneider, *Workmen's Compensation Law* (1941), §89–154	15

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 429

JAMES S. PATTERSON, GENERAL ADMINISTRATOR FOR MOBILE COUNTY, ALABAMA, AS ADMINISTRATOR OF THE ESTATE OF EDGAR A. DOODY, JR., DECEASED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York in *Patterson* (R. 22–25) is reported at 129 F. Supp. 794. The opinion of the District Court for the Southern District of New York in *Sullivan* (R. 10–12) is reported at 130 F. Supp. 53. The opinion of the District Court for the Eastern District of New York in *Vallebuona* (R. 53–54) is reported at 1955 A.M.C. 1234. There were no opinions written by the District Court in *Hays* and

Duncan. The consolidated opinion, per Hand, J., of the United States Court of Appeals for the Second Circuit (R. 55–58) in *Patterson, Sullivan, Hays,* and *Duncan* is reported at 258 F. 2d 702. The *per curiam* opinion of the Court of Appeals in *Vallebuona* (R. 58) is reported at 258 F. 2d 701.

JURISDICTION

The judgments of the Court of Appeals in each of the cases were entered on July 11, 1958 (R. 59–62). The petition for a writ of certiorari was filed on October 8, 1958, and granted on November 24, 1958 (R. 62). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether civilian employees of the United States who are entitled to the benefits of the Federal Employees' Compensation Act, and who are injured in the performance of duty as seamen on publicly-owned and operated vessels employed in merchant service, have a right of action against the United States under the Suits in Admiralty Act.

STATUTES INVOLVED

The pertinent provisions of the Suits in Admiralty Act of 1920, 41 Stat. 525, 46 U.S.C. 741, the Public Vessels Act of 1925, 43 Stat. 1112, 46 U.S.C. 781, the Federal Empolyees' Compensation Act of 1916, 39 Stat. 742, 5 U.S.C. 751, the War Shipping Administration (Clarification) Act of 1943, 57 Stat. 45, 50 U.S.C. App. 1291, and the Federal Employees' Compensation Act Amendments of October 14, 1949,

63 Stat. 854, are set forth in the Appendix, *infra*, pp. 31–37.

STATEMENT

The petitioners in these five cases each claim a right of action against the United States under the Suits in Admiralty Act for damages sustained in the performance of duty as seamen on publicly-operated vessels. In each case, the Government's sole contention is that petitioners have no right of action against the United States because of their entitlement to the benefits of the Federal Employees' Compensation Act, The facts in each of the cases are as follows:

1. *Patterson:* This action was brought by the administrator of the estate of Edgar A. Doody, Jr., to recover damages for the wrongful death of the decedent allegedly sustained in the performance of duty in 1945 as a seaman [1] on board the S. S. HANGING ROCK, a vessel owned and operated by the Government (R. 14–15). The jurisdiction of the court was invoked under both the Public Vessels Act of 1925, *infra*, pp. 31–32, and the Suits in Admiralty Act of 1920, *infra*, p. 31 (R. 14, 15). The Government answered the libel (R. 17–20) and, in addition, filed exceptive allegations (R. 20–22) which set forth (1) that, at all pertinent times, the decedent was a civil service employee of the United States through the mechanical division of the Panama Canal;[2] (2) that

[1] Under 46 U.S.C. 713, all persons employed aboard a vessel, except "apprentices," are "seamen."

[2] Panama Canal Company, which succeeded to the operation of the Mechanical Division of the Panama Canal, is a wholly owned instrumentality of the United States, all of whose stock is held by the President or his designee. Canal Zone

the decedent was fatally injured while performing his duties on the S. S. HANGING ROCK, "a public vessel of the United States, publicly owned and publicly operated by the War Shipping Administration [3] and employed as a merchant vessel"; (3) that, pursuant to the provisions of the Federal Employees' Compensation Act, benefits had been awarded and paid to the widow and minor daughter of the decedent; and (4) that the right to compensation benefits was exclusive of any right of action for the death of the decedent.

The Government's exceptive allegations, unchallenged by the libelant,[4] were sustained by the District

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Code, Title 2, § 246(a), 62 Stat. 1076. The present designee is the Secretary of the Army. See *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 311–315.

[3] Section 202 of the Act of July 8, 1946, 60 Stat. 501, terminated the War Shipping Administration as of September 1, 1946, and transferred its functions to the United States Maritime Commission for the period from September 1, 1946 to December 31, 1946, for the purpose of liquidating the Administration. Upon the abolition of the United States Maritime Commission (1950 Reorg. Plan No. 21, 15 F.R. 3178, 64 Stat. 1273), the remaining functions were transferred to the Department of Commerce, Maritime Administration.

[4] The District Court noted that the pleadings had uncontrovertibly disclosed that, although the decedent had been injured aboard a vessel owned and operated by the War Shipping Administration, whose employees Congress had excluded from the Federal Employees' Compensation Act, he had not been employed through the War Shipping Administration, but rather was a "civil service employee of the United States through the mechanical division of the Panama Canal * * * and hence entitled to the benefits of the Federal Employees' Compensation Act (R. 23). The War Shipping Administration (Clarification) Act, 57 Stat. 45, 50 U.S.C. App. 1291, had excepted "employees of the United States through the War Shipping Administration" from coverage under the Compensation Act and had affirmed the right of such seamen to sue under the Suits

Court (Dimock J.) and the libel was dismissed on the authority of *Johansen* v. *United States*, 343 U.S. 427 (R. 22–26). The libelant, relying on *Inland Waterways Corp.* v. *Doyle*, 204 F. 2d 874 (C.A. 8), had sought to distinguish *Johansen* on the ground that the action in that case was brought under the Public Vessels Act, and that libelant's action could lie under the Suits in Admiralty Act since the HANGING ROCK was employed as a merchant vessel (R. 23–24). Judge Dimock rejected this distinction, holding that the "same considerations" making the Compensation Act remedy exclusive with respect to suits invoked under the Public Vessels Act are applicable to those invoked under the Suits in Admiralty Act (R. 24–25).

2. *Sullivan:* This action was brought by Leonard Lester Sullivan to recover damages and maintenance and cure for personal injuries allegedly sustained in the course of his employment in 1952 as a seaman aboard the towboat ILLINOIS, a ship which was owned, manned and operated by the Inland Waterways Corporation, a wholly owned instrumentality of the United States (R. 6, 10–11).[5] The jurisdiction of the court was invoked under the Suits in Admiralty Act.

in Admiralty Act. See, *infra*, pp. 25 ff. Petitioner Patterson does not dispute the employment status of the decedent (Br. 1).

[5] The Inland Waterways Corporation was created by Congress in 1924 for the purpose, among others, "of carrying on the operations of the Government-owned inland, canal, and coastwise waterways system to the point where the system can be transferred to private operation to the best advantage of the Government * * *". 43 Stat. 360, 49 U.S.C. 151. Its functions and obligations were transferred to the Department of Commerce by 1939 Reorganization Plan No. II, § 6 (53 Stat. 1434, 4 F.R. 2732). The vessels of the Inland Waterways Corporation were sold in 1953.

The Government filed exceptive allegations to the libel (R. 9–10) which set forth (1) that the ILLINOIS was "a public vessel of the United States, publicly operated and employed as a merchant vessel"; (2) that, at all pertinent times, the libelant was a civilian employee of the United States through the Inland Waterways Corporation; and (3) that, as such, libelant's sole and exclusive remedy for his injuries was under the Federal Employees' Compensation Act. The District Court (Kaufman, J.) sustained the Government's unchallenged exceptive allegations and dismissed the libel (R. 13). Relying on *Johansen* v. *United States*, 343 U.S. 427, Judge Kaufman declared (R. 12–13): "I can discern no rational basis for granting an election of remedies to a civilian employee of the United States aboard a merchant vessel when his counterpart aboard a public vessel is denied such an election."

3. *Hays:* This action was brought by Melvin A. Hays to recover damages and maintenance and cure for personal injuries allegedly sustained in the course of his employment as a seaman aboard the MISSOURI, a ship which was owned, manned and operated by the Inland Waterways Corporation, a wholly owned instrumentality of the United States (R. 32–38). The jurisdiction of the court was invoked under the Suits in Admiralty Act (R. 32).

The Government filed exceptive allegations to the libel (R. 43–44) which set forth (1) that the MISSOURI

was "a public vessel of the United States, publicly operated and employed as a merchant vessel"; (2) that, at all pertinent times, the libelant was a civilian employee of the United States through the Inland Waterways Corporation entitled to the benefits of the Federal Employees' Compensation Act; and (3) that libelant's sole and exclusive remedy for his injuries was under the Compensation Act.

The District Court (Bicks, J.) sustained the Government's unchallenged exceptive allegations and dismissed the libel (R. 44).

4. *Duncan*: This action was brought by Sterling Eugene Duncan to recover damages and maintenance and cure for personal injuries allegedly sustained in the course of his employment as a seaman aboard the towboat BATON ROUGE, a ship which was owned, manned and operated by the Inland Waterways Corporation, a wholly owned instrumentality of the United States (R. 26–29). The jurisdiction of the court was invoked under the Suits in Admiralty Act (R. 26).

The Government filed exceptive allegations to the libel (R. 29–30) which set forth (1) that the BATON ROUGE was "a public vessel of the United States, publicly operated and employed as a merchant vessel"; (2) that, at all pertinent times, the libelant was a civilian employee of the United States through the Inland Waterways Corporation entitled to the benefits of the Federal Employees' Compensation Act; and (3) that the libelant's sole and exclusive remedy for his injuries was under the Compensation Act.

The District Court (Palmieri, J.) also sustained the Government's unchallenged exceptive allegations and dismissed the libel (R. 31).

5. *Vallebuona:* This action was brought by Albert Vallebuona to recover damages allegedly sustained as a seaman aboard the Government-owned vessel, the BC–6034. The jurisdiction of the court was invoked under both the Public Vessels Act and the Suits in Admiralty Act (R. 44–45).

The Government filed exceptive allegations to the libel (R. 47–48) which set forth (1) that, at all pertinent times, the libelant was a civilian employee of the Department of the Army assigned to the Terminal Operations Division, Harbor Craft Branch, Operations Section; (2) that the BC–6034, the vessel on which the libelant was allegedly injured, was an Army barge and was "a public vessel of the United States engaged in the public service"; (3) that, after his injury, the libelant had applied for and was awarded compensation benefits under the Federal Employees' Compensation Act; and (4) that the libelant's sole and exclusive remedy for his injuries was under the Compensation Act.

The District Court (Inch, J.), noting that "the libel on its face indicates that libelant was a civilian seaman employed on a public vessel," sustained the Government's exceptive allegations and dismissed the libel on the authority, principally, of *Johansen* v. *United States,* 343 U.S. 427 (R. 53–54).

In each of these cases, the Court of Appeals affirmed the judgments of the District Court (R. 59–62). Judge Learned Hand, writing the single opinion

for the court in *Patterson, Sullivan, Hays,* and *Duncan* (R. 55–58),[6] held that the "same reasoning" in *Johansen,* which precluded a civilian seaman employee of the Government from suing under the Public Vessels Act, applied with equal force to civilian seamen employees of the Government who seek to bring an action under the Suits in Admiralty Act. In so holding, the court disagreed with the contrary result reached by the Court of Appeals for the Eighth Circuit in *Inland Waterways Corp.* v. *Doyle,* 204 F. 2d 874. In *Doyle,* the Eighth Circuit, although it stated that it could conceive of no reason for treating seamen employed on Government "merchant vessels" differently from those employed on Government "public vessels", concluded that, despite their having obtained an award of federal compensation benefits, *Johansen* required that seamen employed on Government "merchant vessels" also be entitled to recover under the Suits in Admiralty Act.

SUMMARY OF ARGUMENT

I

We believe that this Court's decision in *Johansen* v. *United States,* 343 U.S. 427, is dispositive of the issue presented in these cases. In *Johansen,* the Court held that the Federal Employees' Compensation Act is

[6] The *per curiam* opinion affirming the District Court's decree in *Vallebuona* (R. 58) was entered the same day. The panel that decided *Patterson, Sullivan, Hays,* and *Duncan,* consisted of Judges Hand, Hincks and Moore. *Vallebuona* was separately decided by a panel consisting only of Judges Hand and Hincks. Judge Moore, formerly the United States Attorney for the Eastern District of New York, had represented the Government in the District Court in *Vallebuona* (R. 48, 53).

the exclusive remedy for federal civilian seamen injured in the performance of duty on publicly-operated vessels engaged in public service, and that such seamen are precluded from claiming a right of action against the United States under the Public Vessels Act. And the Court, in expressly disapproving the Fourth Circuit's earlier decision in *United States* v. *Marine,* 155 F. 2d 456, also indicated that its determination as to the exclusiveness of the Compensation Act remedy applied equally to actions brought under the Suits in Admiralty Act (the companion statute of the Public Vessels Act) by those injured on publicly-operated vessels engaged in merchant service. As the Court thus implicitly recognized in *Johansen,* no valid reason existed for making the exclusiveness of the Compensation Act remedy turn on the distinguishing factor of whether the action is brought under the Public Vessels Act or the Suits in Admiralty Act.

Both the Second Circuit in these cases and the Eighth Circuit in *Inland Waterways Corp.* v. *Doyle,* 204 F. 2d 874, agree that such a distinction is unsound. However, unlike the Second Circuit here, the Eighth Circuit was of the view that this Court's *Johansen* decision supported the distinction.

We submit that the Second Circuit is clearly right and that the Eighth Circuit's contrary decision (1) failed to take cognizance of this Court's express rejection of *Marine* (a Suits in Admiralty Act case), and (2) mistakenly confused the significance of the Court's discussion in *Johansen* of the comparative rights of "merchant seamen" on Government-owned vessels and "public vessel seamen" on publicly-operated vessels.

In referring to "merchant seamen", the Court was speaking of seamen aboard Government-owned ships chartered for private operation, not of seamen who were Government employees.

Acceptance of the Eighth Circuit's result in *Doyle* would be to impute to Congress an intention to discriminate between the remedies available to seamen employees of the Government merely on the basis of the nature of the service of the particular publicly-operated vessel on which they are employed, despite the fact that there is nothing in either the Suits in Admiralty Act or the Public Vessels Act, both of which form part of the same legislative scheme, which would justify this discrimination.

II

Petitioners contend that the 1949 amendments to the Compensation Act, *infra*, pp. 33–35, demonstrated a Congressional recognition that seamen who are entitled to federal compensation benefits also have a right of action against the Government; they argue that, by these amendments, Congress established for the first time the exclusiveness of the compensation remedy and, by a proviso, deliberately excepted seamen from the exclusiveness limitation. But this very argument was fully considered and rejected by the Court in *Johansen*, where, after a careful review of the legislative history of the amendments, the Court concluded (343 U.S. 427, 438): "If the remedy of compensation was exclusive prior to the passage of the 1949 amendment [as it was], it is exclusive now."

III

The Clarification Act of 1943, *infra*, pp. 36-37, which extended to merchant seamen employed through the War Shipping Administration the right of privately-employed seamen serving on Government-owned vessels to sue the United States under the Suits in Admiralty Act and prohibited such WSA seamen from receiving compensation benefits, conclusively demonstrated the Congressional purpose in not allowing seamen on publicly-operated vessels to have both a right of action against the United States as well as a right to compensation benefits. In granting the WSA merchant seamen (temporarily in Government service in order to man the merchant fleet supporting the war effort), the right to bring suit against the United States under the Suits in Admiralty Act, Congress never considered the possibility of also including them under compensation coverage. Surely, if, as petitioners argue, injured seamen on other Government vessels engaged in merchant service had both a right to compensation and a right of action for damages, Congress would not have discriminated against WSA crew members by giving them only a right of recovery by means of suit, and depriving them of a right to federal compensation.

ARGUMENT

I

THIS COURT'S DETERMINATION IN *Johansen* v. *United States*, 343 U.S. 427, THAT FEDERAL COMPENSATION BENEFITS ARE THE EXCLUSIVE REMEDY FOR CIVILIAN EMPLOYEES OF THE GOVERNMENT, WHO ARE INJURED IN THE PERFORMANCE OF DUTY AS SEAMEN ON PUBLICLY-OPERATED VESSELS EMPLOYED IN PUBLIC SERVICE, IS EQUALLY APPLICABLE WITH RESPECT TO CIVILIAN EMPLOYEES OF THE GOVERNMENT WHO ARE INJURED IN THE PERFORMANCE OF DUTY AS SEAMEN ON PUBLICLY OPERATED VESSELS EMPLOYED IN MERCHANT SERVICE

The Court of Appeals for the Eighth Circuit in *Inland Waterways Corp.* v. *Doyle*, 204 F. 2d 874, and the Court of Appeals for the Second Circuit in the present cases are in full agreement that there exists "no sound reason for making a distinction with respect to remedies between civilian seamen employed by the United States on its 'public vessels' and those employed on its 'merchant vessels' " (cf. *Doyle, supra*, at 878 with R. 57–58). The Eighth Circuit reluctantly held, however, that this Court's *Johansen* decision required the making of such a distinction,[7] while in these cases the Second Circuit was convinced that *Johansen* "did not mean to recognize any such distinction" (R. 57).[8] In these circumstances, we believe it appro-

[7] The Eighth Circuit's holding was also adopted by a District Court in *Cowan* v. *Inland Waterways Corp.*, 121 F. Supp. 683 (E.D. Ill.).

[8] It may be that the Eighth Circuit's failure to appreciate the continuing status of publicly-operated vessels as "public vessels", despite their employment in merchant service, contributed to the court's conclusion in *Doyle*. A "public vessel"

priate, at the outset, to discuss the Court's opinion in *Johansen* to determine which of the conflicting appellate opinions is more properly in accord with that decision. In our view, the Second Circuit is clearly right.

A. THE *Johansen* ONINION

In *Johansen,* the specific issue before the Court was "whether Congress, in enacting the Public Vessels Act of 1925 * * * has consented that the United States be sued for 'damages' by or on behalf of members of the civil service component of the crew of military transport vessels." 343 U.S. 427, 428. The Court held "that the benefits available to such seamen under the Federal Employees Compensation Act * * * are of such a nature as to preclude a suit for damages under the Public Vessels Act". *Ibid.* This conclusion followed from the Court's determination (1) that the Public Vessels Act was not intended to confer additional rights on claimants entitled to the benefits of the Compensation Act (*id.* at 433), and (2) that, although the Compensation Act did not in terms

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of the United States, so long as it is publicly-operated and possessed, is no less a "public vessel" when it is engaged in merchant service than when it is engaged in Government work. "[W]hen, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are." *Berizzi Bros. Co.* v. *S.S. Pesaro*, 271 U.S. 562, 574; see also, *Compania Espanola* v. *Navemar*, 303 U.S. 68, 74; *Ex Parte Peru*, 318 U.S. 578. For this reason, we avoid, throughout this brief, characterizing Government vessels as "public vessels" or "merchant vessels", but, rather, refer to them as "publicly-operated vessels engaged in public service", or "publicly-operated vessels engaged in merchant service".

state that it was the exclusive remedy against the United States for all the employees within its coverage, its comprehensive and uniform character compelled the conclusion that it was clearly intended to be exclusive, and, absent specific legislative exception, it would be so construed (*id.* at 439–441).[9]

Admittedly, the Court's determination in *Johansen* as to the exclusiveness of the Compensation Act remedy arose in connection with actions instituted under the Public Vessels Act.[10] But the Court took pains to indicate that its holding was not to be limited only to actions arising under that Act. After noting that "[t]here is no reason to have two systems of redress", the Court expressly declared that *United States* v. *Marine,* 155 F. 2d 456 (C.A. 4), which had allowed a civilian employee of the Government entitled to compensation benefits to bring suit under the Suits in Admiralty Act, had been incorrectly decided. In explicit language, the Court observed that the "opinions below in the cases we are considering take the opposite [view from *United States* v. *Marine*] and, we think, the better view". 343 U.S. 427, 439.

It seems plain, therefore, that the Court did not

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[9] This conclusion is in complete accord with the general rule concerning compensation statutes, *i.e.*, that, unless the statute is by its terms elective, the compensation rights provided are deemed to be exclusive wherever the statute is applicable. Cf. *Feres* v. *United States*, 340 U.S. 135; *Aubrey* v. *United States*, 254 F. 2d 768 (C.A.D.C.); *Lewis* v. *United States*, 190 F. 2d 22 (C.A.D.C.); see also, 2 Larson, *Workmen's Compensation Law* (1952), § 65.00; Schneider, *Workmen's Compensation Law* (1941), § 89–154; Prosser, *Torts* (1941), p. 543; Note, 14 N. Car. L. Rev. (1936) 199.

[10] *I.e.*, in a case in which the seaman was serving aboard a publicly-operated vessel engaged in public service.

recognize any distinction between, on the one hand, the remedies of civilian employees of the Government who are injured in the performance of their duties on publicly-operated vessels engaged in public employment, and, on the other, the remedies of civilian employees of the Government who are injured in the performance of their duties on Government-operated vessels engaged in merchant employment. Since both classes of federal employees were undeniably entitled to compensation benefits, it mattered not whether the jurisdiction of the court was invoked under the Public Vessels Act (by Government employees injured on publicly-operated vessels engaged in public service), or under the Suits in Admiralty Act (by Government employees injured on publicly-operated vessels engaged in merchant service). The Compensation Act remedy was the exclusive remedy in both instances.

That the Court would not deem it appropriate, in determining the exclusiveness of the Compensation Act remedy, to distinguish between actions arising under the Public Vessels Act and those under the Suits in Admiralty Act is easily understandable. Both admiralty claim statutes are consistently read in *pari materia* as part of the same legislative scheme. Though not phrased in precisely complementary terms, both statutes form and were intended to form an integrated and entire system subjecting the United States to admiralty suits by providing two overlapping nets for the reception and accommodation of litigation resulting from the operation of vessels by or for the United States. See *Calmar S.S. Corp.* v. *United States,* 345 U.S. 446, 451; *United States* v. *Caffey,* 141 F. 2d 69 (C.A. 2); *Mejia* v. *United States,*

152 F. 2d 686 (C.A. 5), certiorari denied, 328 U.S. 862; *Thomason* v. *United States,* 184 F. 2d 105 (C.A. 9); *Aliotti* v. *United States,* 221 F. 2d 598, 602 (C.A. 9); *Olavarria & Co.* v. *United States,* 56 F. Supp. 758, 763 (S.D. Ala.).[11]

The Suits in Admiralty Act, on the one side, was designed to immunize those vessels in which the United States had an interest, and which were employed as merchant vessels, from the seizure which had been held permissible under the Shipping Act of 1916, 39 Stat. 728 (*The Lake Monroe,* 250 U.S. 246), and, in its stead, permitted the filing of a libel in personam against the Government in cases involving Government-owned ships "employed as merchant vessels." 46 U.S.C. 742; see H. Rept. No. 497, 66th Cong., 2d Sess., pp. 3–4; S. Rept. No. 223, 66th Cong., 1st Sess., pp. 1–3; 58 Cong. Rec. 7317. The later Public Vessels Act, on the other side, was designed by Congress to close the remaining gap in the federal legislation by permitting a libel in personam against the United States for causes of action arising from the operation of its "public" vessels. 43 Stat. 1112, 46 U.S.C. 781; see *Canadian Aviator, Ltd.* v. *United States,* 324 U.S. 215, 220–221.

We are unable to find in the legislative history of either statute the slightest evidence that Congress intended to confer additional rights on federally-employed seamen entitled to the benefits of the Federal Employees' Compensation Act. Indeed, neither the

[11] See, also, *Canadian Aviator, Ltd.* v. *United States,* 324 U.S. 215, 220–221; Comment, *Responsibility of the United States on Maritime Claims Arising Out of the Operation of Government-Owned Vessels,* 39 Yale L.J. (1930), 1189; Note, *The Maritime Liability of the United States,* 100 Univ. Pa. L. Rev. (1952), 689, 691–693.

Congress which passed the Suits in Admiralty Act, nor the Congress which passed the Public Vessels Act, seemed to be aware of any possible problem. In these circumstances, it would be anomalous to hold that the Compensation Act remedy was exclusive as to actions invoked under the later Public Vessels Act, but not exclusive as to actions involving the earlier statute, the Suits in Admiralty Act. This fully explains the Court's rejection of the Fourth Circuit's *Marine* case—a Suits in Admiralty Act case—in *Johansen*.[12]

B. THE EIGHTH CIRCUIT'S *Doyle* OPINION MISINTERPRETED *Johansen*

The Eighth Circuit's contrary result in *Doyle* was engendered, we believe, by the failure of that court to observe the disapproval of the *Marine* case in the *Johansen* opinion, and, moreover, by the Eighth Circuit's belief that the Court's discussion in *Johansen* of the rights of "merchant seamen," as opposed to the rights of "public vessel seamen,"[13] supported a distinction between the rights of those Government employees injured on publicly-operated vessels engaged in public service, and those injured on publicly-operated vessels engaged in merchant service. In this significant respect, we submit that the Eighth Circuit was in error.

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[12] Moreover, the liberal construction of statutes in order to benefit seamen is subject to the rule of strict construction of grants of the right to sue the Government. *McMahon* v. *United States*, 342 U.S. 25, 27. When, as here, Congress has created a special remedy, that remedy is exclusive. *Wilder Manufacturing Company* v. *Corn Products Co.*, 236 U.S. 165, 174–175; *United States* v. *Babcock*, 250 U.S. 328, 331.

[13] See 343 U.S. at 434–5.

The "merchant seamen" to whom the Court was alluding in *Johansen* (343 U.S. at 434–5) were those seamen employed on Government-owned vessels which had been chartered out for private operation by shipping companies,[14] as well as those seamen employed by the Government through the War Shipping Administration, whom Congress had explicitly excluded from the Federal Employees' Compensation Act (see *infra*, pp. 25 *ff.*). Such seamen—not being federal employees for the purpose of entitlement to federal compensation benefits—had, for their only remedy, the usual private seamen's suit for negligence, indemnity, or maintenance against the United States under the Suits in Admiralty Act. In *Johansen,* the issue was simply whether those seamen who were employed by the Government and entitled to federal compensation benefits were to be given, in addition, a right of action against the Government enjoyed by the seamen (*i.e.,* "merchant seamen") who were not regarded as Government employees entitled to compensation benefits. This was the limited sense in which the term "merchant seamen" was referred to in *Johansen,* and we believe it was this limited usage of the term which the

[14] In its first reference to "merchant seamen" (343 U.S. at 432), the *Johansen* opinion recalls the Shipping Act of 1916 as subjecting Government vessels to the standards applicable to private merchant vessels, "if they were purchased, chartered, or leased from the Shipping Board"; the opinion then adds, "Thus a remedy for damages for personal injuries was given to merchant seamen on ships in which the Government had an interest but not to public-vessel seamen." In its context, this reference to "merchant seamen" clearly means those seamen aboard Government-owned ships which had been sold, chartered, or leased to private parties for private operation.

Eighth Circuit failed to perceive. Cf. Judge Kaufman's opinion in *Sullivan*, R. 12, fn. 2.

On the other hand, the issue in the present cases, as well as in *Doyle*, is whether all federal civilian seamen who are entitled to federal compensation benefits (regardless of whether their vessels are employed in merchant or in public service) are to be treated alike, or whether distinctions based upon the type of service in which the vessels are engaged at the time of injury should be drawn. In repudiating *United States* v. *Marine*—a suit brought under the Suits in Admiralty Act because the publicly-operated vessel there was engaged in merchant service[15]—this Court in *Johansen* indicated that such distinctions would not be drawn, and that the Compensation Act would be the exclusive remedy. See *supra*, pp. 14 *ff*.

Accordingly, we submit that the Court's opinion in *Johansen* compels the conclusion that federal civilian seamen entitled to federal compensation benefits are precluded from suing the Government to recover damages for their injuries, despite the fact that the vessels upon which they were employed were engaged in merchant service. Acceptance of the Eighth Circuit's views in *Doyle* would be to impute to Congress an intention to discriminate between the remedies available to seamen employees of the Government on the basis of the nature of the service in which the particular publicly-operated vessel on which they are employed is engaged. In the absence of a clear Congressional mandate justifying this discrimination

[15] See 155 F. 2d 456, 457 (C.A. 4).

(and here there is none), the Compensation Act should "naturally be regarded as exclusive." *Johansen* v. *United States*, 343 U.S. 427, 440. As the court below implicitly recognized, no sound reason exists for presuming a Congressional disposition to treat compensation benefits as appropriate for one class of Government-employed seamen and not for another. Such a presumption would contribute "neither to uniformity nor to fairness." *Id.* at 441.[16]

II

THE COMPENSATION ACT AMENDMENTS OF 1949 DID NOT EVIDENCE A CONGRESSIONAL RECOGNITION THAT FEDERAL SEAMEN WHO ARE ENTITLED TO COMPENSATION BENEFITS ALSO HAVE A RIGHT OF ACTION AGAINST THE GOVERNMENT

We have shown in Point I that, under *Johansen*, the Compensation Act remedy must be deemed exclusive regardless of whether the jurisdiction of the Court is invoked under the Public Vessels Act or the

[16] Since the sale by the Government of the vessels of the Inland Waterways Corporation (involved in *Doyle*) in 1953, the problem presented by these cases—of a right of action under the Suits in Admiralty Act—is now of importance substantially only with respect to the rights of crew members on the two vessels operated by the Panama Canal Company between New York and the Canal Zone. In respect of those two vessels, suits by passengers, shippers, etc., may be brought against the United States in admiralty pursuant to the Suits in Admiralty Act, 46 U.S.C. 741–749, or against the Panama Canal Company pursuant to Canal Zone Code, Title 2, §§ 245, 248(d), 62 Stat. 1075, 1076, 1078, as amended by the Act of September 26, 1950, 64 Stat. 1038.

In our view, military transports are not employed as merchant vessels merely because of the presence aboard of occasional private cargo or passengers, as authorized by 10 U.S.C. 4745 and 4747 (1956).

Suits in Admiralty Act. Petitioners' other argument, *i.e.*, that *Johansen* should be overruled because "circumstances have so changed" (Br. 4) since the Court's decision in that case less than seven years ago, merits little comment. Suffice it to state that *Johansen* rests on the Court's determination that the Compensation Act remedy was intended by Congress to be the exclusive remedy for service-connected injuries of federal civilian seamen entitled to its benefits. It is difficult to see how this conclusion with respect to Congressional intent can be altered by "changing circumstances," absent specific legislation by Congress indicating a contrary intent. Cf. *United States* v. *South Buffalo R. Co.*, 333 U.S. 771, 774–775. And Congress, of course, has enacted no such legislation.

Petitioners further argue (Br. 18–21) that *Johansen* was incorrectly decided, principally because in their view the Court failed to give proper consideration to the 1949 amendments to the Compensation Act. These amendments (63 Stat. 854, *infra*, pp. 33–35) expressly declared the exclusiveness of compensation, but provided that this new declaration should not change the preexisting rights of "* * * a master or member of the crew of any vessel," *infra*, pp. 34, 35. It is petitioners' contention that, by these amendments, Congress had for the first time established the exclusiveness of the compensation remedy and had deliberately excepted seamen (Br. 20). The short and dispositive answer to this contention is that the precise argument was fully considered and rejected by the Court in *Johansen*. The Court said (343 U.S. 427, 436–438):

* * * The purpose of the 1949 amendment is simply "to make it clear that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities * * *." S. Rep. No. 836, 81st Cong., 1st Sess., p. 23. This clarifying amendment, as reported out of the Senate Committee on Labor and Public Welfare, lacked the proviso protecting the rights, if any, of seamen under other federal statutes. However, no seamen's groups having participated in the hearings on the bill, Senator Morse proposed on the floor the proviso on which petitioners rely. Senator Morse himself recognized that his amendment did no more than preserve to seamen any rights which they might have in addition to compensation. There is language in his statement indicating that he was of the opinion that seamen employees had a choice between compensation and litigation in admiralty. 95 Cong. Rec. 13608, 13609. Senator Douglas, who was in charge of the bill, accepted these amendments for the reason that the seamen's groups had not been heard before the committee of Congress. He stated:

"Mr. President, I should like to state my ground for agreeing to the amendments offered by the Senator from Oregon [Mr. Morse]. The primary consideration for accepting the Senator's amendments preserving the maritime rights and other statutory remedies of seamen is the fact that no hearings were held, no arguments were heard, and no discussion was had on this aspect of the pending bill * * *. For the same reason, namely, that we have had no hearings on the matter, we are not seeking to

> legislate affirmatively as to certain claims and denials of a right of election of remedies under existing laws, which claims and denials have not yet been adjudicated by the Supreme Court, although various other Federal courts have, in effect, held that federally employed seamen have such an election.
>
> "In short, until the matter may be more fully considered by Congress, we seek by the amendments merely to make sure that seamen shall lose no existing rights."

The Court noted that, as thus recommended, the bill passed the Senate (95 Cong. Rec. 13609) and was accepted by the House, without debate, a week later (95 Cong. Rec. 14060). And the Court concluded (343 U.S. at 438):

> * * * This background makes it clear that the 1949 amendments, far from changing the law respecting seamen's remedies, do not even reflect a belief on the part of Congress that the remedy of compensation is not exclusive. There is nothing in these amendments to affect consideration of whether petitioners' sole remedy is under the Federal Employees Compensation Act. Cf. *Johnson* v. *United States,* 186 F. 2d 120, 123. If the remedy of compensation was exclusive prior to the passage of the 1949 amendment, it is exclusive now.

It was thus abundantly clear to the Court, after full consideration of the legislative history of the 1949 amendments, that no change in the existing law was intended. "If the remedy of compensation was

exclusive prior to the passage of the 1949 amendment, it is exclusive now." *Ibid.*[17]

III

WHEN CONGRESS, FOR SPECIAL REASONS, HAS THOUGHT IT DESIRABLE THAT SEAMEN EMPLOYED ON GOVERNMENT VESSELS ENGAGED IN MERCHANT SERVICE SHOULD HAVE THE RIGHT TO SUE THE UNITED STATES UNDER THE SUITS IN ADMIRALTY ACT, IT HAS PASSED SPECIAL LEGISLATION TO THAT EFFECT AND PROHIBITED SUCH SEAMEN FROM RECEIVING COMPENSATION

In our view, the enactment by Congress of the Clarification Act of 1943[18] (extending to merchant seamen employed through the War Shipping Administration the right of suit against their employer, the United States, and excluding them from the Federal Employees' Compensation Act) established that Congress never intended federal civilian seamen to enjoy both a right of action against the United States as well as a right to compensation benefits.

---

[17] Nor is this conclusion altered by the petitioners' seeming reliance (Br. 20-21) on Section 303(g) of the 1949 amendments. That section was intended merely to extend the time within which an injured employee might apply for benefits due under the Act, if and when any action he had brought against the United States was decided against him. See *Sasse* v. *United States*, 201 F. 2d 871, 873–874 (C.A. 7); *De Vos* v. *United States*, 121 F. Supp. 514 (E.D. N.Y.); cf. *United States* v. *Meyer*, 200 F. 2d 110, 111 (C.A. 5). There is nothing in the section which authorizes suit against the United States by crew members who are entitled to compensation benefits.

[18] War Shipping Administration (Clarification) Act, 57 Stat. 45, 50 U.S.C. App. 1291, *infra*, pp. 36–37.

When the War Shipping Administration undertook the large-scale operation of virtually the entire private merchant fleet in 1942, the question arose as to the desirability of assimilating such ordinarily private seamen (temporarily in Government service in order to man the cargo vessels supporting the war effort) to those seamen who were federal employees under the Compensation Act.[19] The General Counsel of the War Shipping Administration explained the situation to Congress in this way:[20]

> As private employees, seamen are entitled to the protection of the old-age benefit provision of the Social Security System; they and their dependents may recover damages for injury or death of seamen through the provision of the Jones Act, they are protected by other remedies and they have certain rights with respect to allocations of wages. When the same seamen work on vessels which are bareboated or owned by the War Shipping Administration they become Government employees and these rights, which union labor has learned to prize very highly, either cease to exist or are substantially impaired. In exchange for such lost privileges, these seamen acquire special privileges of Gov-

[19] In February and March 1942, when the War Shipping Administration was created and proceeded to requisition the American merchant fleet and inaugurate its plan for direct Government operation, the entire merchant fleet was privately operated, employing some 55,000 seamen. Ninety percent of the 1,375 ocean-going vessels were privately owned. Ten percent were Government-owned but were demised by the Maritime Commission for private operation.

[20] House Merchant Marine and Fisheries Committee, 77th Cong., 2d Sess., Hearings on H.R. 7424 (September 2, 1942), p. 14.

> ernment employees such as right to compensation for injury under the United States Compensation Act, a questionable right to retirement benefits and other rights peculiar to Government employees.
>
> Seamen constantly interchange between time chartered vessels on which they are private employees, and bareboated or owned vessels on which the personnel becomes employees of the Government. The rights of seamen may thus change from voyage to voyage depending upon the particular status of the vessel upon which they happen to sail. In view of the interchangeability of seamen, this creates many administrative difficulties. Moreover, it seems to us that since the interval of Government operation represents but a temporary phase of the history of the merchant marine, it would be best to maintain the status of seamen as private employees with respect to such matters.

The general understanding in and out of Congress was plainly that the exclusive right of federal civilian seamen was compensation, and that WSA merchant seamen were being fairly dealt with when they were given, in exchange for the right of compensation, the same right of recovery by suit, *but without compensation*, which had always been the exclusive right of private merchant seamen. This understanding was emphasized in the letter of the Chairman of the Compensation Commission commenting on the Clarification bill. It stated:[21]

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[21] House Merchant Marine and Fisheries Committee, 77th Cong., 2d Sess., Hearings on H.R. 7424 (September 2, 1942), p. 6; H. Rept. No. 107, 78th Cong., 1st Sess., p. 34.

> It is the Commission's understanding of the proposed legislation that its application is to be limited to seamen employed by or on behalf of the War Shipping Administration, and that the rights heretofore long enjoyed by seamen in other Federal services, who have acquired status as civil employees of the United States, will not be disturbed or affected. In this connection it may be pointed out that in services such as the Army Transport Service, seamen have been employed directly as civil employees of the United States and for many years have received the protection of the Federal Employees' Compensation Act.
>
> * * * The bill apparently would merely provide a basis for recovery of damages for injury or death only in the very limited class of cases where the employer was negligent. Negligence of the employer or contributory negligence or fault of the employee is not a factor in determining the payment of workmen's compensation benefits, and employees and dependents receive the same protection in all injury or death cases, whether or not the employer was at fault.

Thus, fully aware of the difference in rights, Congress deliberately extended to WSA seamen the right to sue the United States under the Suits in Admiralty Act, and, at the same time, prohibited them from receiving compensation benefits. If WSA seamen already had a right of action against the United States

under the Suits in Admiralty Act, as petitioners must argue, there would have been no need to pass legislation granting them a right to sue and excluding them from compensation.

Moreover, it is difficult to believe, as petitioners also must argue, that, if injured seamen on publicly-operated vessels engaged in merchant service had both the right to compensation and the right of action for damages, that Congress in the Clarification Act would have discriminated against WSA crew members by giving them only a right of recovery by means of suit and depriving them of the right to compensation. The purpose of the Clarification Act was certainly not to restrict the rights of those merchant seamen to whom it applied.

We submit, therefore, that the Clarification Act of 1943 serves as further strong evidence that Congress never intended to confer upon federal civilian seamen injured on publicly-operated vessels engaged in merchant service a right to compensation benefits, plus an additional right to recovery by means of suit. When Congress deemed it desirable, for special reasons, to allow the large class of WSA merchant seamen to bring suit against the United States under the Suits in Admiralty Act, it never for one moment considered the possibility of also extending compensation coverage to them. By the same token, as the *Johansen* case holds, Congress has never conferred upon seamen injured on publicly-operated vessels engaged in public service, who are entitled to compensation benefits, an additional right of recovery by means of suit. It would be unreasonable, we believe, to infer, in the

silence of Congress, that seamen injured on publicly-operated vessels engaged in merchant service, who are indisputably entitled to compensation benefits, enjoy additional rights over WSA seamen (who are entitled to bring suit, but are not entitled to compensation) or to the other federal civilian seamen (who are entitled to compensation, but cannot bring suit).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be affirmed.

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MARCH 1959.

APPENDIX

1. The pertinent provisions of the Suits in Admiralty Act of 1920, 41 Stat. 525, 46 U.S.C. 741, 742, are as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.
>
> SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. * * *

* * * * *

2. The pertinent provisions of the Public Vessels Act of 1925, 43 Stat. 1112, 46 U.S.C. 781, 782, are as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided,* That the cause of action arose after the 6th day of April, 1920.

SEC. 2. That such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suits shall be subject to and proceed in accordance with the provisions of an Act entitled "An Act authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes," approved March 9, 1920, or any amendment thereof, in so far as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

* * * * *

3. The pertinent provisions of the Federal Employees' Compensation Act of 1916, 39 Stat. 742, 5 U.S.C. 751, are as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death.
>
> * * * * *
>
> SEC. 7. That as long as the employee is in receipt of compensation under this Act, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States.
>
> * * * * *

4. The pertinent provisions of the Federal Employees' Compensation Act Amendments of 1949, 63 Stat. 854, are as follows:

> * * * * *
>
> SEC. 201. Section 7 of the Federal Employees' Compensation Act, as amended (5 U.S.C., 1946 edition, sec. 757), is further amended by inserting the designation "(a)" immediately before the first sentence thereof and by adding to such section a new subsection reading as follows:

"(b) The liability of the United States or any of its instrumentalities under this Act or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compenation law or under any Federal tort liability statute: *Provided, however,* That this subsection shall not apply to a master or a member of the crew of any vessel."

* * * * *

SEC. 302. The provisions of this Act shall not be construed to authorize the payment of any compensation under the Federal Employees' Compensation Act in any case where, pursuant to private relief legislation, a beneficiary of such legislation has accepted payment of a grant in satisfaction of the liability of the United States (or its corporation, agency, or other instrumentality) in such case, or where such liability has been compromised and settled, or other satisfaction received, as the result of any action sounding in tort or under maritime law, or where a lump sum has been received under section 14 of the Federal Employees' Compensation Act and the lump-sum award is not modified or set aside for other reasons.

SEC. 303. * * *

* * * * *

(g) The amendment made by section 201 of this Act to section 7 of the Federal Employees' Compensation Act, making the remedy and liability under such Act exclusive except as to masters or members of the crew of any vessel, shall apply to any case of injury or death oc-

curring prior to the date of enactment of this Act: *Provided, however,* That any person who has commenced a civil action or an action in admiralty with respect to such injury or death prior to such date, shall have the right at his election to continue such action notwithstanding any provision of this Act to the contrary, or to discontinue such action within six months after such date before final judgment and file claim for compensation under the Federal Employees' Compensation Act, as amended, within the time limited by sections 15 to 20 of such Act (including any extension of such time limitations by any provision of this Act), or within one year after enactment of this Act, whichever is later. If any such action is not discontinued and is decided adversely to the claimant on the ground that the remedy or liability under the Federal Employees' Compensation Act is exclusive, or on jurisdictional grounds, or for insufficiency of the pleadings, the claimant shall, within the time limited by sections 15 to 20 of such Act (including any extension of such time limitations by any provision of this Act), or within one year after final determination of such cause, whichever is later, be entitled to file a claim under such Act.

* * * * *

SEC. 305. (a) Nothing contained in this Act shall be construed to affect the exclusion of certain seamen (as defined in the Act of March 24, 1943, ch. 26, 57 Stat. 45, as amended; 50 U.S.C., Appendix, sec. 1291) from the terms of the Federal Employees' Compensation Act, as provided by such Act of March 24, 1943, as amended.

(b) Nothing contained in this Act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel.

* * * * *

5. The pertinent provisions of the War Shipping Administration (Clarification) Act of 1943, 57 Stat. 45, 50 U.S.C. App. 1291, are as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a) officers and members of crews (hereinafter referred to as "seamen") employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to (1) laws administered by the Public Health Service and the Social Security Act, as amended by subsection ~~(b)(2) and (3) of this~~ section; (2) death, injuries, illness, maintenance and cure, loss of effects, detention, or repatriation, or claims arising therefrom not covered by the foregoing clause (1); and (3) collection of wages and bonuses and making of allotments, have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels. Such seamen, because of the temporary wartime character of their employment by the War Shipping Administration, shall not be considered as officers or employees of the United States for the purposes of the United States Employees Compensation Act, as amended; the Civil Service Retirement Act, as amended; the Act of Congress approved March 7, 1942 (Public Law 490, Seventy-seventh Congress); or the Act entitled "An Act to provide benefits for the injury, disability, death, or detention of employees of contractors with the United States and certain other persons or reimbursement therefor", approved December 2, 1942 (Public Law 784, Seventy-seventh Congress). Claims arising under clause (1) hereof shall be enforced in the same manner as such claims would be enforced if the seaman were employed on a privately owned and operated American vessel. Any claim re-

ferred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act. Any claim, right, or cause of action of or in respect of any such seaman accruing on or after October 1, 1941, and prior to the date of enactment of this section may be enforced, and upon the election of the seaman accruing on or after October 1, 1941, and prior to the date of enactment of this section may be enforced, and upon the election of the seaman or his surviving dependent or beneficiary, or his legal representative to do so shall be governed, as if this section had been in effect when such claim, right, or cause of action accrued, such election to be made in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration. Rights of any seaman under the Social Security Act, as amended by subsection (b)(2) and (3), and claims therefor shall be governed solely by the provisions of such Act, so amended. When used in this subsection the term "administratively disallowed" means a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration. When used in this subsection the terms "War Shipping Administration" and "Administrator, War Shipping Administration" shall be deemed to include the United States Maritime Commission with respect to the period beginning October 1, 1941, and ending February 11, 1942, and the term "seaman" shall be deemed to include any seaman employed as an employee of the United States through the War Shipping Administration on vessels made available to or subchartered to other agencies or departments of the United States.

* * * * *

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Supreme Court of the United States

October Term, 1958

No. 429

JAMES S. PATTERSON, General Administrator for Mobile County, Alabama, etc., LEONARD LESTER SULLIVAN, MELVIN A. HAYS, ET AL.,

Petitioners,

against

UNITED STATES OF AMERICA.

SUPPLEMENTAL BRIEF, INCLUDING HISTORICAL NOTES ON AMERICAN MERCHANT SHIPPING

JACOB RASSNER,
Counsel for Petitioners.

INDEX

PAGE

Supplemental Brief, including Historical Notes on American Merchant Shipping 1-17

Petitioners pray for equality of Congressionally granted rights for tort, death and personal injury damages, suffered in the service of the American merchant marine on Government operated vessels, the same as on privately operated vessels, exclusively under maritime law 2

Appendix 19

Cases Cited

Aguilar v. Standard Oil Co., 1943, 318 U. S. 724, 63 S. Ct. 930, 87 L. Ed. 1107 15

American Stevedores, Inc. v. Porello, 328 U. S. 827, 153 F. 2d 605, 330 U. S. 446, 91 L. Ed. 1011 ..... 7, 9

Beaton Park, The, 65 F. Supp. 211 10

Bisso v. Inland Waterways Corporation, 349 U. S. 85, 75 S. Ct. 629 ..... 3, 5, 6, 9, 17

Byonnes, etc. v. United States, D. C. 298 F. 123 10

Canadian Aviator, Ltd. v. U. S., 324 U. S. 215, 65 S. Ct. 639, 89 L. Ed. 901 ..... 7, 9

Cohen v. United States, 195 F. 2d 1019 13

Federal Housing Administration, Region No. 4 v. Burr, 309 U. S. 242, 60 S. Ct. 488 11

Goltra v. Inland Waterways Corporation, 49 F. 2d 497 14

Iroquois, The, 1904, 194 U. S. 240, 24 S. Ct. 640, 48 L. Ed. 955 15

PAGE

Johansen v. U. S., 343 U. S. 427, 72 S. Ct. 849 15

Mandel v. U. S., 343 U. S. 427, 72 S. Ct. 849 15

Osceola, The, 1903, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760 15

Panama Canal Company v. Grace Line, 78 S. Ct. 752, 356 U. S. 311 25

Pennell v. Home Owners' Loan Corporation, 21 F. Supp. 497 12

Portland Trust & Savings Bank v. United States, 24 F. Supp. 953 13

Prato v. Home Owners' Loan Corporation, 106 F. 2d 128 12

Sevin v. Inland Waterways Corporation, 88 F. 2d 988 9

Skinner and Eddy Corp. v. McCarl (1927) 275 U. S. 1, 6, 7 2

Sloan Shipyards Corp. v. U. S. Shipping Board Emergency Fleet Corporation (1922) 258 U. S. 549 2

Strang v. U. S., 254 U. S. 491 2

United States v. Loyola, 161 F. 2d 126 12

United States v. Mayor and Council of City of Hoboken, 29 F. 2d 932 1

Wham v. U. S. (C. A. D. C. 1949) 180 F. 2d 38 2

Whan v. Green Star S. S. Corporation, 22 F. 2d 483 .. 21

Miscellaneous Citations

	PAGE
Act of July 8, 1946, Sec. 202, 60 Stat. 501	23
Adams (Henry Carter)	7
Attorney General (Opinion of) 120 (1923)	2
Attorney General (Opinion of) 241 (1924)	2
Attorney General (Opinion of) 363 (1925)	2
Bar Bulletin, Vol. 16	15
Bulletin No. 1238, U. S. Dept. of Labor	3, 4, 26
Clarification Act of 1943	8
Congressional Record of April 21, 1959	16
Emergency Fleet Corporation (The)	21
Federal Employee's Compensation Act, 5 U. S. C. Sec. 751, et seq., Sec. 791-4(b)	6, 8
House Merchant Marine & Fisheries Committee, H. R. 7424, 77th Congress, 2nd Session	10
Inland Waterways Corporation	14, 22
Merchant Marine Act (The) of 1920	22
Merchant Marine Act (The) of 1936, Ch. 27, Sec. 1101	22
Merchant Shipping Industry (The)	19
Relation of the State to Industrial Action and Economics and Jurisprudence, Columbia University Press, 1954	7
Reorganization Plan No. 21, 15 F. R. 3178, 64 Stat. 1273	23, 24, 26

PAGE

Reorganization Plan No. II, Sec. 6, 53 Stat. 1434, 4 F. R. 2732 22

Reorganization Plan No. 6, Eff. Aug. 19, 1949, 14 F. R. 228, 63 Stat. 1069 26

Shipping Act of 1916 (The) 21

Title 2, Chap. 858, Sec. 203, 49 Stat. 1987 p. 294 23

U. S. Department of Commerce Publication of November, 1958 20

U. S. Formation of the Union 19

U. S. Shipping Board, C. 250, Sec. 3, 41 Stat. 989 .. 22

Urgent Deficiencies Act of June 15, 1917, 40 U. S. Stat. at L. 182, C. 29 21

War Shipping Administration 23

39 Stat. 728 21

46 U. S. C. 801 et seq. Comp. St. Secs. 8146(a) et seq. 46 U. S. C. Secs. 741-752 21

46 U. S. C. Ch. 858, Secs. 201, 204, 49 Stat. 1987 Secs. 1111-1114 22

46 U. S. C. Secs. 804, 804(a), 805, 806, 809, 810, 810(a), Ch. 861 24

49 U. S. C. Sec. 151 22

50 U. S. C. Sec. 1291 8

Supreme Court of the United States

October Term, 1958

No. 429

—o—

JAMES S. PATTERSON, General Administrator for Mobile County, Alabama, etc., LEONARD LESTER SULLIVAN, MELVIN A. HAYS, *et al.*,

Petitioners,

against

UNITED STATES OF AMERICA.

—o—

SUPPLEMENTAL BRIEF, INCLUDING HISTORICAL NOTES ON AMERICAN MERCHANT SHIPPING

We gratefully avail ourselves of the privilege granted by this Honorable Court to submit a supplemental brief, including some historical notes concerning United States merchant shipping.

The Constitutional power of Congress to permit the Government to engage in the shipping business is discussed by Judge Clark in the case of *United States* v. *Mayor and Council of City of Hoboken, N. J.*, 29 F. 2d 932, at page 946 in the following language:

> "It is to be noted that the original shipping acts, 46 USCA § 801, and the two Merchant Marine Acts of 1920 and 1928, 46 USCA § 861, and Pamphlet Supplement USCA § 891, all contain references to the national defense or to the use of ships as naval or military auxiliary or both. These references may indicate the Congress' own view that the powers assumed are implied in their 'war powers,' or, perhaps, as part of the powers appertaining to sovereignty rather than obtained from the commerce clause. It may also be argued that the shipping, or,

for that matter, [illegible] business, comes within the meaning of the general welfare clause of the Constitution. Article I, [illegible], cl. 1."

Petitioners pray for equality of Congressionally grantetd rights for tort, death and personal injury damages, suffered in the service of the American merchant marine on Government operated vessels, the same as on privately operated vessels, exclusively under maritime law.

Compensation law grants complete immunity from liability in certain tort cases and substantial limitation of damages in all others, thus, giving tremendous advantage to a shipowner as to the measure of damages under compensation law, than liability under maritime law.

It is common knowledge that all maritime unions and American merchant seamen in general, have consistently opposed Congressional enactment of compensation law, insofar as they are concerned by reason of such law being confiscatory of rights granted seamen by Congress.

Corporations, the stock of which is owned by the United States, are distinct entities from the United States, as other corporations are distinct entities from their stockholders, and employees of such corporations are not employees of the United States.

Strang v. *U. S.*, 254 U. S. 491;
Sloan Shipyards Corpn. v. *U. S. Shipping Board Emergency Fleet Corpn.* (1922) 258 U. S. 549;
Skinner and Eddy Corpn. v. *McCarl* (1927) 275 U. S. 1, 6, 7 citing;
34 Opinions of the Attorney General, 241 (1924);
Whan v. *U. S.* (C. A. D. C. 1949) 180 F. 2d 38, 41;
34 Opinions of the Attorney General 120 (1923);
34 Opinions of the Attorney General 363 (1925).

To quote from Mr. Justice Frankfurter in the case of *Bisso* v. *Inland Waterways Corporation*, 349 U. S. 85, 75 S. Ct. 629, at page 118:

> "Certainly we cannot assume that the Government is exploiting the maritime services it is rendering in an unreasonable or coercive manner."

The Government when in case of war or other emergency, is compelled to operate its vessels, it does so through a general agent or other subsidiary Government owned corporation or company.

The tremendous excess of labor over available employment on ships in time of peace destroys the equality of bargaining between the parties.[1]

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[1] After war broke out in Korea, ships were withdrawn from the Government reserve fleet and by March, 1952, over 500 such vessels were in operation.

Today the total U. S. merchant fleet (active and inactive) of oceangoing vessels of 1,000 gross tons and over, numbers about 3,000 ships of over 30,000,000 deadweight tons.

According to Bulletin No. 1238 of the United States Department of Labor, November, 1958, the American Merchant Marine consists of 2,984 vessels of 32,398,000 deadweight tons as of June 30, 1957. About one-third is privately owned. The United States Government owned 1,968 vessels, totalling 19,366,000 deadweight tons. However, of said number, most are laid up in the reserve fleet.

The United States has in active service 161 ships.

The average complement of each merchant vessel is 47.

Master

1 Second Mate	6 Able-Bodied Seamen
1 Third Mate	3 Ordinary Seamen
1 Fourth Mate	1 Chief Engineer
1 Radio Officer	1 First Assistant Engineer
1 Purser/Pharmacist	1 Second Assistant Engineer
1 Bosun	1 Third Assistant Engineer
2 Deck Maintenance *	2 Junior Third Assistant Engineers

* Operating requirements may prescribe additions of a carpenter or deck maintenance.

[Continued on page 4]

In the *Bisso* case, *supra*, the Court, both in the prevailing and dissenting opinions, are in agreement that the prevailing policy of the United States is to reject judicial

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[Continued from page 3]

1 Electrician
1 Second Electrician
1 Engine Maintenance
3 Oilers
3 Firemen, Water Tenders
3 Wipers
1 Chief Steward
1 Chief Cook
1 Cook and Baker
1 Assistant Cook
6 Messmen/utility men

The average time of industry connected seamen is 243 days.

"*Annual Employment*

"During the year studied, industry connected seamen averaged 243 days of employment (table B-1). This average, however, conceals wide variations in the number of days worked by industry connected seamen. Thus, over 8 percent worked less than 120 days and over 30 percent worked less than 210 days. On the other hand, 27 percent worked more than 300 days during the year. This study verified the common belief that licensed officers more frequently stay with the same employer and have fewer periods of unemployment than do unlicensed personnel. They might, therefore, be expected to average many more days of employment than unlicensed seamen. During the period of study, however, this difference was surprisingly small.

The fact should be kept in mind that the year of employment studied was one of the peak peacetime years for shipping and that many seamen were able to secure all the work they wanted during the year. The average licensed officer, in fact, was employed for as many or more days as the fully employed shoreside worker on a 5-day week. If earned vacation time, which is not included in the employment on earnings estimates in the study, is added to the average employment of unlicensed seamen, they also would have had, on the average, total employment almost equal to a fully employed 5-day week shoreside worker. The average unlicensed seaman would have earned 9 days' vacation at base pay for his 239 days of employment." Bulletin No. 1238, United States Department of Labor, pages 26, 27.

The estimate number of available seamen is 100,000 with jobs but for only 60,000 (p. 7).

[Continued on page 5]

sanction to any agreement induced under conditions where there is inequality of bargaining power between the parties to the contract.

In the cases at bar, the seamen were not in fact employees of the United States Government, but of separate and distinct agencies.

[Continued from page 4]

June	Number of active American flag vessels	Total complement
1950	1,145	57,250
1951	1,414	70,700
1952	1,386	69,300
1953	1,358	67,900
1954	1,123	56,150
1955	1,101	57,510
1956	1,091	57,190
1957	1,153	60,730
1958	937	51,430
Average	1,190	60,910

(Page 26)

It is the custom of the trade that seamen get their employment through a particular union.

International Organization of Masters, Mates and Pilots (MMP);
National Marine Engineers' Beneficial Association (MEBA);
American Radio Association (ARA);
Radio Officers Union of the Commercial Telegraphers Union (ROU);
American Merchant Marine Staff Officers Association (AMMSOA);
Staff Officers Association of America (SOA);
National Maritime Union of America (NMU);
Seafarers' International Union of North America (SIU);
Sailors' Union of the Pacific (SUP) (p. 88).

When "employment" is a pure fiction, the Supreme Court of the United States has stated in the *Bisso* case, *supra*, that it will look at the true facts and disregard the fiction.

The power of this Court to correct inequity in admiralty matters is stated by Mr. Justice Frankfurter in the dissenting opinion in the *Bisso* case, *supra*, in the following language at page 98:

> "Drawing on its constitutional powers in matters maritime, Art. III, sec. 2, this Court has probably made as much substantive admiralty law through adjudication as has Congress by legislation."

and further stated at page 116:

> "This Court has not, to be sure, in every instance awaited congressional action before imposing views of public policy upon contracting parties."

There is no conflict of opinion but that a seaman has but one exclusive remedy for a personal injury or death claim.

It is in the nature of the remedy wherein the difference of opinion lies.

It is axiomatic that whether the remedy comes within the category of a compensation claim or is one in the nature of a maritime claim against the United States Government depends on Congressional intent.

The Government's position is that the *Federal Employees' Compensation Act*, 5 U. S. C., sec. 751, *et seq.* (1916) provides the exclusive remedy.

It is petitioners' contention that Congress did not and factually could not have considered the rights of seamen employed on Government operated vessels at that time, as there weren't any such vessels in existence then.

The *Compensation Act*, *supra*, is completely silent as to its applicability to merchant seamen, consequently, in and

of itself, it has no probative value in determining Congressional intent with relation to seamen's rights.

Our thoughts could perhaps be better expressed by quoting from Henry Carter Adams [2]:

> "* * * much of the confusion that now surrounds the question of the appropriate duties of government, so far as the people in this country are concerned, is due to the failure to distinguish between laissez-faire as a dogma and free competition as a principle."
>
> "* * * in speaking of the claims of laissez-faire, we are dealing with a rule laid down for the control of all matters of government, and have to do with 'permanent and universal principles of human nature,' only so far as we undertake to explain the basis upon which it is conceived to rest."

Justice requires that in determining the rights of seamen, all related acts should be considered in *pari materia,* as this Court has consistently ruled,[3] more fully pointed out in petitioner's main brief.

Insofar as we are concerned with the intent of Congress, it appears to be of the utmost importance to understand the reasons which impelled Congress to act. For the answer, we look to the history of the United States Merchant Marine and the purposes of the seamen Acts as expressed by Congress.

The main issue is whether seamen employed on merchant vessels operated by the United States Government in public service are excluded or included within the provisions of the Federal Compensation Act of September 7, 1916, *supra,* in the main brief.

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[2] Relation of the State to Industrial Action and Economics and Jurisprudence, Columbia University Press, 1954.

[3] *American Stevedores, Inc.* v. *Porello,* 328 U. S. 827, 153 F. 2d 605, 330 U. S. 446, 91 L. Ed. 1011;

Canadian Aviator, Ltd. v. *United States,* 324 U. S. 215, 65 S. Ct. 639, 89 L. Ed. 901.

It is no more than fitting and proper that in determining Congressional intent that the purposes of the Act be considered.

The language of the Compensation Act, *supra*, is silent as to whether or not said Act includes seamen in the employ of the United States Government.

The purpose and scope of the Act is clearly set forth in footnote 1 of § 751 of U. S. C. 5 in the following language:

> " * * * to give compensation to its employees, who otherwise would be without remedy when injured by the fault of the government, * * * ".

Congress having provided a remedy for seamen employed on United States vessels by various Seamen's Acts, as set forth in the main brief, are not without remedy and therefore do not come within the purposes or scope of the Compensation Act.

The purposes and scope of the Act was to exclude seamen, and this fact is further demonstrated by the Act of October 14, 1949, 5 U. S. C. § 7914(b) and 50 U. S. C. Sec. 1291, which provides as follows: (This section was incorrectly cited in the main brief at pg. 19 as sec. 575 instead of sec. 791).

> "(b) Nothing contained in this Act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel. Oct. 14, 1949, c. 691, Title III, § 305, 63 Stat. 868."

The same Congressional intent is further demonstrated by the Clarification Act of 1943 in the following language:

> " * * * Such seamen, because of the temporary wartime character of their employment by the War Shipping Administration, shall not be considered as officers or employees of the United States for the purposes of the United States Employees Compensation Act, as amended; * * * ". (Govt's brief, p. 36)

No distinction is justified by the fact that seamen are employed by, rather than on behalf of, the War Shipping Administration. *Bisso, supra.*

This view seems to be practically conceded by the following which appears at the foot of page 27 of the brief for the United States:

> "* * * This understanding was emphasized in the letter of the Chairman of the Compensation Commission commenting on the Clarification bill. It stated: 'House Merchant Marine and Fisheries Committee, 77th Cong., 2d Sess., Hearings on H. R. 7424 (September 2, 1942), p. 6; H. Rept. No. 107, 78th Cong., 1st Sess., p. 34.'
>
> It is the Commission's understanding of the proposed legislation that its application is to be limited to seamen employed by or on behalf of the War Shipping Administration, * * *".

The technical distinction of employment by or on behalf of the War Shipping Administration should not be given restrictive meaning, but interpreted as all remedial legislation in a liberal view. *American Stevedores, Inc.* v. *Porello, supra; Canadian Aviator, Ltd.* v. *United States, supra.*

The Court in the case of *Sevin* v. *Inland Waterways Corporation*, 88 F. 2d 988, expressed its rejection of restrictive meaning in the following language at page 989:

> "The act does not confine itself to vessels of corporations in which the United States *then* owned the entire stock, but uses the future tense 'shall own,' and the Inland Waterways Corporation falls clearly within the words. The act controls such suits against this corporation as are within its terms."

Congress, at all times without exception, made no distinction between the status of merchant seamen on one merchant vessel as against another on the basis of ownership, or operation of the particular ship, or the voyage in

question. A concession that this is so appears in the brief for the United States where in the middle of page 27 the following is stated, as the opinion of the General Counsel of the War Shipping Administration, as expressed to the House Merchant Marine and Fisheries Committee on September 2, 1942:

> "* * * Moreover, it seems to us that since the interval of Government operation represents but a temporary phase of the history of the merchant marine, it would be best to maintain the status of seamen as private employees with respect to such matters."

Judge Learned Hand in the case of *Bygonnes, etc.* v. *United States, D. C.*, 298 F. 123, pointed out that it is the nature of the work in which the vessel is employed which is to be considered and not the question of ownership.

All of the vessels in question in the case at bar were merchant vessels, and consequently, all of the seamen working thereon are entitled to be treated uniformly, the same as seamen in private employment, regardless of what use the vessels happen to be put to for a particular voyage.

In the case of *The Beaton Park*, 65 F. Supp. 211, the Court stated at page 212:

> "(1, 2) In this country our theory as to government in business is that when our Government enters upon an ordinary commercial business undertaking, such as operating merchant ships, it does so under the same liabilities and responsibilities as private individuals when they engage in the same kind of business; and Congress has given consent for the institution of legal actions by those aggrieved for the enforcement of such liabilities of the Government. In respect to merchant ship operations, we do not recognize the Government as having immunity from suit."

It is respectfully submitted that when the Government carries cargo or passengers, it does not perform a single act, more nor less, than a private shipowner.

The carrying of freight or passengers constitutes competition with commercial shippers. The fact that the Government does not make a charge for such service in nowise diminishes the fact that the commercial shipper is deprived of the opportunity of carrying the merchandise which he otherwise would do.

This interferes with private shipping and is contrary to the entire history of Congressional enactment relative to the American merchant marine and all the shipping Acts, without exception.

Our courts, particularly the Supreme Court of the United States, have consistently held that where the Government enters into the activities of a private business, it should be treated, insofar as practicable, as a private person or corporation.

The Supreme Court of the United States in the case of *Federal Housing Administration, Region No. 4 v. Burr*, 309 U. S. 242, 60 S. Ct. 488, stated at page 245 (U. S. Report):

> "(3, 4) As indicated in Keifer & Keifer v. Reconstruction Finance Corporation, supra, we start from the premise that such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed. This policy is in line with the current disfavor of the doctrine of governmental immunity from suit, as evidenced by the increasing tendency of Congress to waive the immunity where federal governmental corporations are concerned. Keifer & Keifer v. Reconstruction Finance Corporation, supra. Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued', it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to 'sue and be sued' is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or con-

> stitutional scheme,[3] that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense. In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued', that agency is not less amenable to judicial process than a private enterprise under like circumstances would be."

In the case of *Pennell* v. *Home Owners' Loan Corporation*, 21 F. Supp. 497, the Court stated at page 499:

> "(8) 'When the United States enters into commercial business it abandons its sovereign capacity and is to be treated like any other corporation.' Sales v. U. S., 2 Cir., 234 F. 842, 844."

In the case of *Prato* v. *Home Owners' Loan Corporation*, 106 F. 2d 128, the Court stated at page 129:

> "(1) 'The government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work.' United States v. Lee, 106 U. S. 196, 213, 221, 1 S. Ct. 240, 254, 261, 27 L. Ed. 171; Sloan Shipyards Corp. v. U. S. Fleet Corp., 258 U. S. 549, 567, 42 S. Ct. 386, 388, 66 L. Ed. 762. * * * "

Judge Denman clearly expresses the fair, just and correct intent of Congress when he states in the case of *United States* v. *Logola*, 161 F. 2d 126, at page 127 as follows:

> "(2) Under the Suits in Admiralty Act of 1920, 46 U. S. C. A., sec. 741 et seq., we have held that 'the United States in the operation of its merchant vessels' is liable for the relief of a seaman for his maintenance and cure. McInnis v. United States, 9 Cir., 152 F. 2d 387. In reaching the conclusion that the sovereign has here yielded its immunity for suit, we follow the decision of the Canadian Aviator case, 324

> U. S. 215, 65 S. Ct. 643, that the broad language of the Public Vessels Act 'was deliberate and is not to be thwarted by an unduly restrictive interpretation.' Our interpretation is also supported by the long established rule that legislation affecting a seaman's injuries and maintenance and cure is to be construed liberally in the seaman's favor. Jamison v. Encarnacion, 281 U. S. 635, 640, 50 S. Ct. 440, 74 L. Ed. 1082; Aguilar v. Standard Oil Co., 318 U. S. 724, 729, 63 S. Ct. 930, 87 L. Ed. 1107; Cortes v. Baltimore Insular Line, 287 U. S. 367, 375, 53 S. Ct. 173, 87 L. Ed. 368."

Judge James Alger Fee expressed the same view in the case of *Portland Trust & Savings Bank v. United States*, 24 F. Supp. 953, in the following language at pages 954 and 955:

> "While the statute of consent is to be strictly construed in favor of the United States, precaution should be used not to violate an obvious purpose of the Congress by a too rigid application of that canon of construction."

The decision in the case of *Cohen v. United States*, 195 F. 2d 1019, Judge Chase speaking for the Court consisting of Judges Augustus N. Hand, Chase and Frank, stated at page 1021:

> "(1-3) While it is well settled that statutes permitting the government to be sued are to be construed strictly, McMahon v. United States, 342 U. S. 25, 72 S. Ct. 17, the overriding consideration is that the intent of Congress, where that can be determined, must be given effect. Keifer & Keifer v. Reconstruction Finance Corp., 306 U. S. 381, 59 S. Ct. 516, 83 L. Ed. 784; Guiseppi v. Walling, 2 Cir., 144 F. 2d 608, 624, 155 A. L. R. 761, affirmed 324 U. S. 244, 65 S. Ct. 605, 89 L. Ed. 912; Johnson v. United States, 1 Cir., 163 F. 30, 18 L. R. A., N. S., 1194."

The vessels involved are concededly all merchant vessels. Neither petitioner nor the Government are urging a

distinction as to whether or not merchant vessels are utilized in public or private service.

Congress set up various agencies for operation of its merchant fleet, but only for a limited time, to meet existing emergency. One of such agencies was the Inland Waterways Corporation, which is discussed as follows in the case of *Goltra* v. *Inland Waterways Corporation*, 49 F. 2d 497, wherein the Court stated at page 498:

> "The defendant, the Inland Waterways Corporation, was created by Act of Congress of June 3, 1924 (49 USCA Secs. 151-156), for the purpose of carrying on the operations of the government-owned inland canal and coastwise waterways system to the point where the system might be transferred to private operation to the best advantage of the government. The Secretary of War was deemed to be the incorporator, and was authorized to govern and direct the corporation in the exercise of the functions vested in it by law. The corporation was to continue the operation of the transportation and terminal facilities then operated by the Secretary of War. Section 6 of the Act (49 USCA Sec. 156 (a.b.d.) provides in part as follows:
>
> "(a) The Secretary of War shall transfer to the corporation all assets transferred to, or acquired, constructed, or operated by, or under the direction of, the Secretary of War, or which revert to the United States, under section 201 of the Transportation Act, 1920, as amended. * * *
>
> "(b) The rights, privileges, and powers, and the duties and liabilities, of the Secretary of War, or the inland and coastwise waterways service, in respect of any contract, loan, lease, account, or other obligation, under section 201 of such Act, or under such joint resolution, shall become the rights, privileges and powers, and the duties and liabilities, respectively, of the corporation."

Congress has never made any statement or passed any Act wherein it is stated that a seaman employed in the

service of the United States Government in its merchant fleet is relegated to compensation in the event of personal injury or death.

The Government's brief, urging that technical distinctions be made between *seamen* and *seamen* on the basis of the circumstances under which he is hired, rather than the nature of his employment, does violence to the American concept of uniformity of Admiralty law.

> *The Osceola*, 1903, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760;
> *The Iroquois*, 1904, 194 U. S. 240, 24 S. Ct. 640, 48 L. Ed. 955;
> *Aguilar* v. *Standard Oil Co.*, 1943, 318 U. S. 724, 63 S. Ct. 930, 87 L. Ed. 1107.

Congress has consistently given directives in each and every instance wherein it legislated concerning the United States Government operated merchant marine, that employment and customary commercial practice in the maritime industry be applied in the operation of its merchant fleet.

It is not our intention to criticize the decisions in *Johansen* v. *United States*, 343 U. S. 427, 72 S. Ct. 849 and *Mandel* v. *United States*, 343 U. S. 427, 72 S. Ct. 849, but to point out that the effects thereof have caused results contrary to Congressional intent.

In justification for what might otherwise seem too presumptuous, which we assure the Court is furthest from our mind, we refer to an excerpt from the Bar Bulletin, Volume 16, pages 206 and 207, which reported the address of Mr. Justice John M. Harlan, as follows:

> "Welcome Criticism
>
> Sixty years ago when the Court also sat in a controversial climate, Mr. Justice Brewer had this to say:

"It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. The moving waters are full of life and health; only in the still waters is stagnation and death."

"For my part the truth of this statement is not debatable. The Supreme Court, no less than the top echelons of the other two great branches of the Federal Government, should never be immune from criticism. Indeed the Court itself, perhaps more often than not, has divided on the great issues coming before it, and should the Court in the doing of its work ever be led to sacrifice the oathbound views of its individual members to the more comfortable business of unanimous decision it would soon cease to be worth its salt. Dispassioned criticism of the Court's decisions is something to be welcomed, and if in order to preserve that healthy state of affairs the Court must also suffer unjust attacks it is a price that must be paid."

The urgency and imperative need of uniform admiralty rules comes within direct focus at a time when our Merchant Marine, as Senator Magnuson said on April 21, 1959, as reported in the Congressional Record of April 21, 1959, at page 5771, is facing acute problems.

"THE AMERICAN MERCHANT MARINE

MR. MAGNUSON. Mr. President, the American Merchant Marine, in company with the shipping of all the world, is having its troubles. Foreign trade is down, and cargoes are scarce. World tonnage is far in excess of current needs. As a result, freight rates are down, to the point where U. S. flag vessels find it difficult, if not actually impossible, to be competitive.

> To cap it all, certain shipping conference agreements, under which our shipping has been able to work cooperatively with their foreign competitors, have been questioned by the Supreme Court. The problems thus created must be resolved before temporary 'status quo' legislation enacted last year expires on June 30, 1960.
>
> It is a matter of urgent importance to the great maritime industry of our country, one that merits the most thorough attention of all Members of this body."

We respectfully submit that under all of the circumstances, the present situation calls for the exercise of its constitutional powers in matters maritime, Article 3, Section 2, in accordance with the expression of Mr. Justice Frankfurter, as heretofore stated in the *Bisso* case, *supra*, to the end that we may enjoy uniformity of decision and equality of remedies in matters maritime.

Respectfully submitted,

JACOB RASSNER,
Counsel for Petitioners.

APPENDIX

Historical Background

Prior to the Revolutionary War, the American Colonists did build and sail merchant ships and did trade over all the oceans and with all of the ports of the world. With the invention of new types of ships, the schooner and clipper, which were superior to all other vessels, at the end of the eighteenth century, American ships carried almost all of this country's growing trade.

On August 18, 1787, when the Federal Convention was in session, the members of the Convention adopted the issues of James Madison, that the proper power for the general government would be not to "build and equip fleets" but "to provide and maintain a navy."[4]

Reports of registered tonnage was first made in 1793, and according to Alexander Hamilton, Secretary of Treasury, our tonnage employed in foreign commerce was 289,394.

According to H. C. Calvin and E. G. Stuart,[5] on December 31, 1789, we had 123,893 tons of shipping under the American flag, and by 1800 the tonnage had increased to 667,107.

In 1800, the United States had its first Navy.

The United States was successful with its experiments of steamboats like Robert Fulton's Clermont, which demonstrated the reliability of steampower in 1807. Twelve years later, the S.S. Savannah successfully crossed the Atlantic under steam power.

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[4] United States Formation of the Union--Documents—Library of Congress—page 568.

[5] The Merchant Shipping Industry, H. C. Calvin & E. G. Stuart, John Wiley & Sons, Inc., 1925.

With the coming of steam, America lost her lead among maritime nations for she lacked the abundant coal close to the sea and the skilled iron workers which Great Britain had.

After March 3, 1815, we removed the discriminating duties in favor of American ships, following which during the years 1816 to 1829, the principal maritime countries of the world accepted partial reciprocity with reference to the shipping of this country.

In 1898, when American ships were carrying less than 10% of United States trade, and it was necessary for the Army and Navy to purchase 136,700 tons of foreign merchant shipping, our Government first attempted to help merchant shipping by granting contracts to carry mail or by permitting the import of shipbuilding materials without tariff.[6]

By 1901, American ships carried but 8% of our foreign trade. In 1913, The House Committee on the Merchant Marine and Fisheries conducted an investigation as to need of control over ocean transportation. On the basis of the report of said Committee, Congress established a shipping board having regulatory and quasi judicial functions over shipping.

After August 15, 1914, American citizens were permitted to buy foreign built vessels and transfer them to American registry and we did buy over three-quarters of a million of the finest vessels.

When the first World War broke out in Europe, ships of the warring nations were suddenly withdrawn from our service and a great shipbuilding program was begun. It is then that we find the United States Government establishing an agency for United States Shipping.

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[6] United States Department of Commerce Publication of November, 1958, entitled the U. S. Merchant Marine, A Brief History.

The United States Shipping Board Emergency Fleet Corporation was established pursuant to the provisions of the Shipping Act of September 7, 1916, which Act was the foundation for putting the United States into merchant shipping.

From 1917 until the time of the armistice, the Shipping Board worked through the Emergency Fleet Corporation.

The Emergency Fleet Corporation was created with a limitation of existence for five years after secession of hostilities.

The United States first entered the shipping business under the authority of the Shipping Act of 1916, c. 451, § 1, 39 Stat. 728, 46 U. S. C. § 801-814, *et seq.* This Act provided for the creation of a Shipping Board, and in substance, for the Government to go into the business of operating merchant vessels.

The Emergency Fleet Corporation was organized by the Board on April 16, 1917 and granted powers equivalent to that of private shipping companies. Its functions were limited to the mercantile trade.

See: *Whan* v. *Green*, 22 F. 2d 483.

It built a total of 2,318 vessels from 1918 to 1922. However, after the close of the war there was "A slump in shipping during the world-wide depression in the 1930's brought the United States merchant fleet again to a dangerously low level. In 1936 our merchant marine was fourth among the six leading maritime nations in tonnage, sixth in vessels 10 years of age or less, fifth in vessels with speeds of 12 knots or over."

The Urgent Deficiencies Act of 1917 (p. 485) further facilitated the operation of merchant vessels and authorized the President to requisition ships to such agencies as he should select.

On June 5, 1920, the United States Shipping Board was formed and its duties enumerated. c. 250, § 3, 41 Stat. 989.

The functions of the operating agencies of Government owned merchant vessels as well as agencies were changed from time to time.

The purpose and policy of the United States in maintaining and operating a merchant fleet is set forth in the Merchant Marine Act of 1920, 46 U. S. C. § 861.

The Inland Waterways Corporation was created by Congress in 1924 for the purpose, among others, "of carrying on the operations of the Government-owned inland, canal, and coastwise waterways system to the point where the system can be transferred to private operation to the best advantage of the Government * * *". 43 Stat. 360, 49 U. S. C. 151. Its functions and obligations were transferred to the Department of Commerce by 1939 Reorganization Plan No. II, sec. 6 (53 Stat. 1434, 4 F. R. 2732). The vessels of the Inland Waterways Corporation were sold in 1953.

Chapter 27 of the Merchant Marine Act of 1936, § 1101 declares the policy of the United States being to foster the development and encourage the maintenance of a merchant marine. Title 46 U. S. C., sec. 1101. Thereafter pursuant to the Act of June 29, 1936 ch. 858 §§ 201, 204, 49 Stat. 1987, U. S. C. 46, §§ 1111 and 1114 of the United States Maritime Commission was created and the function of the former United States Shipping Board, including those vested in the Department of Commerce by Ex. Ord. No. 6166, referred to above, transferred thereto.

At all times we find the clear expression of Congress that it intended that merchant vessels be " * * * owned and operated insofar as practical by citizens of the United States * * *."

The Merchant Marine Act, 1936, set up a United States Maritime Commission consisting of five members. The

Commission made a survey of the state of the merchant marine and laid out a long-range program of shipbuilding designed to provide 500 new ships in the next 10 years. A new basic type of cargo ship was designed, the "C" type ship, and a fine new passenger liner, the S. S. AMERICA was built.

On June 29, 1936 the U. S. Shipping Board Emergency Fleet Corporation was dissolved.

Chap. 858-Title 2, § 203, 49 Stat. 1987 (p. 294 in the footnote).

The War Shipping Administration came into existence by the President's order on February 7, 1942. Section 202 of the Act of July 8, 1946, 60 Stat. 501, terminated the War Shipping Administration as of September 1, 1946, and transferred its functions to the United States Maritime Commission for the period from September 1, 1946 to December 31, 1946, for the purpose of liquidating the Administration. Upon the abolition of the United States Maritime Commission (1950 Reorg. Plan No. 21, 15 F. R. 3178, 64 Stat. 1273), the remaining functions were transferred to the Department of Commerce, Maritime Administration.

From 1942 through 1945 the United States shipyards built 5,592 merchant ships, of which 2,701 were Liberty ships, 414 were the faster Victory type, 651 were tankers, 417 were standard cargo ships, and the remaining 1,409 were military or minor types.

The Government also took over the direction of ship operation. In February 1942 the War Shipping Administration was established for this purpose. The head of the Maritime Commission was also head of this new agency, and the two departments worked closely together.

The Army and Navy took many merchant ships as auxiliaries, for use as hospital ships, repair ships, airplane carriers, and for other special uses.

In 1942, the United States Merchant Fleet consisted of 1375 ocean-going vessels, employing some 55,000 men.

After World War II, the Government sought to restore the merchant fleet to private control as quickly as possible. By the end of 1947 all the vessels taken over from private operators had been returned to their owners.

When the sales authority under the Merchant Ship Sales Act expired on January 15, 1951, 1,956 ships had been sold, 843 to American and 1,113 to foreign flag operators, at a return of nearly two billion dollars to the Government. Surplus vessels were laid up in reserve fleets at eight sites throughout the country, where they were carefully preserved for emergency use.

For some time after the war there were not enough privately owned ships to carry all the relief supplies needed. Operators therefore chartered government ships in large numbers to supplement their own services. By mid-1947 there were 1,500 government-owned ships under charter. As economic conditions abroad improved and merchant fleets were stored, the government-owned ships were returned to the reserve fleets. By mid-1950 the number under charter had dropped to less than 100.

The War Shipping Administration was dissolved on September 1, 1946, and its remaining functions were returned to the Maritime Commission.

Since the Commission did not prove sufficiently flexible for this dual job, it was abolished by the President's Reorganization Plan 21 of 1950. In its place the President established two new agencies, the Federal Maritime Board, and the Maritime Administration, which he placed under the jurisdiction of the U. S. Department of Commerce.

The functions of the mechanical division of the Panama Canal were taken over by the Panama Canal Company, a wholly owned instrumentality of the United States.

In the case of *Panama Canal Company* v. *Grace Line*, 78 S. Ct. 752, 356 U. S. 311, the Panama Canal Company is explained in the following language at page 753:

> "Petitioner was created by Congress in 1950. 64 Stat. 1041. It holds the assets of the Panama Canal and has the duty of operating and maintaining it. It may sue and be sued in its corporate name. Canal Zone Code, Tit. 2, sec. 248, 62 Stat. 1078, as amended, 64 Stat. 1038. Prior to 1950 the Panama Canal was operated by the President through the Governor of the Canal Zone. 37 Stat. 561. Business activities incident to that operation were conducted by the Panama Railroad Co., a federal corporation, 62 Stat. 1076, which was an agency and instrumentality of the United States, *ibid.* Those auxiliary business activities were "designed and used to aid" in the management and operation of the Canal. See People of State of New York ex rel. Rogers v. Graves, 299 U. S. 401, 406, 57 S. Ct. 269, 271, 81 L. Ed. 306. Since 1950 all those business activities have been carried on by petitioner, the Panama Canal Co., all of whose stock is held by the President or his designee, Canal Zone Code, Tit. 2, sec. 246(a), the present designee being the Secretary of the Army."

1944—Approximately 2,500 liberty ships
400 C types
500 tankers
100 Victory ships

3,500

1945—November 1st—4,442 ships and 240,000 officers and men

1945—End of World War II—4,286 ships and 250,000 officers and men

After war broke out in Korea, ships were withdrawn from the Government reserve fleet and by March, 1952, over 500 such vessels were in operation.

Today the total U. S. merchant fleet (active and inactive) of ocean-going vessels of 1,000 gross tons and over, numbers about 3,000 ships of over 30,000,000 deadweight tons.

According to Bulletin No. 1238 of the United States Department of Labor, November, 1958, the American Merchant Marine consists of 2,984 vessels of 32,398,000 deadweight tons as of June 30, 1957. About one third is privately owned. The United States Government owned 1,968 vessels, totalling 19,366,000 deadweight tons. However, of said number, most are laid up in the reserve fleet.

The United States has in active service 161 ships.

The average complement of each merchant vessel is 47.

All executive and administrative functions of the Maritime Commission were transferred to the Chairman of the Maritime Commission by 1949 Reorg. Plan No. 6, eff. Aug. 19, 1949, 14 F.R. 5228, 63 Stat. 1069. See note set out under section 111 of this title.

On the authority of the 1950 Re-organization Plan #21 the "Federal Maritime Board" was substituted for "Maritime Commission".

1956—3,179 ships

1957—3,075 ships—1,102 active and 1,973 temporarily inactive.

1958—Government owned 2,123 ships

The United States Coast Guard, through the Merchant Marine counsel, is now holding public hearings which commenced Monday, April 27, 1959, for the purpose of receiving helpful suggestions for the betterment of American Merchant Marine, and it seems to us that nothing would be more valuable than assistance from the Supreme Court of the United States in fostering equality of maritime rights and uniformity of admiralty law.

FILED
JUN 2 1959
JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1958

No. 429

JAMES S. PATTERSON, General Administrator for Mobile County, Alabama, etc., LEONARD LESTER SULLIVAN, MELVIN A. HAYS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING

JACOB RASSNER,
Attorney for Petitioners,
15 Park Row,
New York, N. Y.

Supreme Court of the United States

October Term, 1958

No. 429

—o—

JAMES S. PATTERSON, General Administrator for Mobile County, Alabama, etc., LEONARD LESTER SULLIVAN, MELVIN A. HAYS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA.

—o—

PETITION FOR REHEARING

The petition for rehearing is filed herein pursuant to Rule 33 of the Supreme Court Rules, and is presented in good faith and not for delay, and is restricted to the questions hereinafter more particularly set forth.

In view of the importance of the above entitled matter to all American seamen, which affects their economy, we trust that this Court will not consider it impertinent on our part to ask for reconsideration of this matter.

On May 18, 1959, this Honorable Court in a per curiam decision stated as follows:

> "No arguments are presented by petitioners which were not fully considered in *Johansen* and rejected."

It appears that we were obviously in error when we assumed that the Supreme Court of the United States would be satisfied with the analysis of the historical background of the United States' participation in merchant shipping, as set forth in the historical notes in petitioners' supplemental brief.

This having failed to serve its purpose, we respectfully ask this Honorable Court to consider the realistic facts which have taken place since the *Clarification Act of 1943*, 57 Stat. 45, 50 U. S. C. App. sec. 1291.

The fact is, and no one will contradict the accuracy of the statement that the United States Government is not operating merchant vessels, as the Government does not employ seamen directly.

Separate and distinct entities such as the Inlands Waterways Corporation, operating the Federal Barge Lines and the Panama Canal Company and other similar corporations, companies or entities, operating as independent units, are in fact conducting the business of merchant shipping. It is these companies that hire the seamen and not the United States Government.

This is clearly demonstrated by Exhibit "1", submitted herewith, which is a copy of the contract between Inlands Waterways Corporation and National Maritime Union of America, CIO, and by Exhibit "2" aiso submitted herewith, which is a copy of part of a letter which is self explanatory. That letter was written by the attorneys for the National Maritime Union of America to Jacob Rassner, under date of May 26, 1959.

We submit that the events following the enactment of the *Clarification Act, supra*, establish the fact that the United States Government is not employing seamen directly but that it has set up separate entities which operate ships and employ seamen, the same as any other private shipper. It is not the Government that does so.

Accordingly, we urge that these entities, though Government owned, are not entitled to immunity from suit.

We have pointed out in our previous briefs, particularly in the supplemental brief, that this Court has consistently held that where the United States Government

engages in commercial ventures, it is treated on the same basis as private business

Exhibit "1" demonstrates that the independent entities which are Government owned comply with all obligations and assume all risks of private shipping companies in dealing with the seamen whom they hire.

The mere fact that these seamen are called, and we contend erroneously called "civilian employees" of the United States Government, factually our seamen are employed in commercial shipping and are entitled in justice and fairness to the same rights as any other seaman employed by any other private company, irrespective of who happens to be the stockholders; the President of the United States, a private citizen or a Government subdivision.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioners.

APPENDIX

Exhibit 1

WHEREAS IN ORDER TO PROMOTE INDUSTRIAL PEACE AND HARMONY THE INLAND WATERWAYS CORPORATION, OPERATING THE FEDERAL BARGE LINES, HEREINAFTER REFERRED TO AND KNOWN AS THE "CORPORATION", AND THE NATIONAL MARITIME UNION OF AMERICA, C.I.O., ITS OR THEIR SUCCESSORS OR ASSIGNS, HEREINAFTER REFERRED TO AND KNOWN AS THE "UNION", DO ON THIS.....DAY OF..... 1947, AGREE AS FOLLOWS:

Subject to the laws of the United States of America (including section 305 of the Government Corporations Appropriations Act of 1948) and authorized directives of the Agencies of the United States in conformity with the laws of the United States, now or hereafter in effect; it is hereby agreed:

ARTICLE I

SECTION 1. (a) The Corporation agrees to recognize the Union as the accredited representative for the unlicensed boat employees on all vessels owned, operated, or chartered, covering working conditions when the crews of such boats are employees of and on the payroll of the Corporation.

(b) It is the intention of the Corporation to continue its present labor policies concerning hiring and union security until a union security pattern for private industry on the rivers has been established, and when this has been established or if there should be a new Federal personnel policy established, the Corporation will discuss any proposed changes in its policy with the Union.

SECTION 2. In making appointments under this Agreement preference must be given to veterans as required in the regulations for the administration and enforcement of the Veterans' Preference Act of 1944. Strict compliance with the provisions of this Act is the responsibility of the Corporation. The Corporation also must grant the rights of former employees to restoration after military service, pursuant to the requirements of the Selective Training and Service Act.

SECTION 3. The Corporation agrees to permit duly accredited representatives of the Union to board its vessels in any port, at any time, for the purpose of carrying on legitimate Union activities. The Union agrees to cooperate in the conduct of Union activities aboard the boats, in order that such activities will not interfere with normal operation of the vessel or proper supervision by the Master.

SECTION 4. The Corporation agrees not to discriminate against members of the Union for legitimate Union activities. The right of employees off watch to hold meetings aboard the boat at least once a week is specifically recognized.

SECTION 5. The Union shall take out insurance mutually satisfactory to the Union and the Corporation which will protect the Corporation and its agent, charterer, operator, and subsidiary or affiliated companies for any claim, loss, damage, or liability for loss of life or injury occurring to a representative of the Union while on the property or aboard any vessels owned, chartered, or leased by any of the aforesaid parties.

ARTICLE II

GENERAL CONDITIONS

SECTION 1. After the first twenty-four (24) hours in port, and where it is previously determined and posted on

the vessel's bulletin board that the vessel will remain in port an additional twenty-four (24) hour period or periods, the Corporation agrees to maintain repair work schedules on an eight (8) hour basis. (Not applicable to boats being commissioned or decommissioned.)

When safety of equipment or property is required, square watches will be maintained. Such emergencies will be written into the boat's log.

For the purpose of this rule, port time shall commence when the vessel is properly secured alongside the dock and the engine rung off; and port time shall cease when standby is rung.

SECTION 2. All members of the crew, including those permitted to be ashore, are to be aboard their boats not less than thirty (30) minutes before the posted time of departure. The time of departure shall be posted aboard the boat. An employee missing the boat due to departure prior to posted time shall not be penalized in any way and expenses incurred in joining the boat shall be paid by the Corporation.

SECTION 3. Meal hours while under way shall be as follows: Breakfast between 5:30 and 6:30 A. M., Dinner between 11:30 and 12:30; Supper between 5:30 and 6:30 P. M.; except when the men are detained by duty.

SECTION 4. The Corporation will endeavor to pay all employees covered by this Agreement twice each month, on or before the 10th and 25th of each month.

SECTION 5. In the event an employee has been discharged and believes he has been unjustly dealt with, such discharge may be handled as a grievance under the procedure outlined in Article V.

SECTION 6. A rest period of not less than twenty (20) minutes shall be allowed at 9:00 A. M., 3:00 P. M., 9:00

P. M., and 3:00 A. M., unless such rest periods interfere with operations. At such times coffee and lunch shall be made available to the crew. This privilege shall not be abused.

SECTION 7. Subject to the provisions of Article I, Section 2 of this Agreement when a vessel is laid up (except in stand by condition) the crew which lays up the vessel shall have the right to return to their jobs when the vessel comes back into operation.

SECTION 8. The Corporation agrees to furnish adequate rain clothes, (sou'-westers and oilskins) for all members of the deck department. Raincoats to the extent of two shall be made available to engine department members required to work outside the engine room during inclement weather. The Union agrees that members shall be held individually financially responsible for such rain clothes issued to them.

SECTION 9. In case of injury to a member of the crew, the Corporation will furnish transportation, subject to limitations imposed by Standardized Government Travel Regulations, to nearest physician or Marine Hospital, when necessary. The Corporation will follow the same procedure as in the above sentence in case of emergency illness.

SECTION 10. (a) The Corporation agrees that when it is determined that a vessel is to lay-up, immediately upon receipt of such advice, the Master shall post a notice on the bulletin board of the boat.

(b) The Corporation agrees to notify the Union whenever a vessel is to be refiitted, giving time, place, and manner of reshipment.

SECTION 11. Laundry equipment for the crew's laundry will be furnished by the Corporation and it is understood that the crews will clean and maintain such equipment.

SECTION 12. The Corporation reserves the right to establish manning scales but no changes will be made without prior consultation with the Union.

SECTION 13. All members of the galley crew shall divide their duties so as to perform their duties within a spread of twelve (12) working hours, insofar as possible.

SECTION 14. In no case shall men be required to work under dangerous or unsafe conditions. The Corporation will furnish life belts and the men will be required to wear them while on duty.

SECTION 15. The Corporation will pay transportation in accordance with Standardized Government Travel Regulations, as specifically set forth in Appendix "A" and only when such travel is authorized by an official designated to do so.

SECTION 16. (a) The following described work will not be required on Saturday afternoon, Sundays, legal holidays, or between the hours of 5:00 P. M. and 7:00 A. M., except as may be deviated from on specific occasions, by mutual agreement.

1. Cleaning paint
2. Painting
3. Chipping paint
4. Work not necessary to the safe and efficient navigation of the vessel, the tow, and/or safety, well-being or health of the personnel.

(b) The Corporation, in conformity with paragraph (a) of this Section, agrees to recognize the following holidays: New Year's Day; Washington's Birthday; Decoration Day; July 4th; Labor Day; Armistice Day; Thanksgiving Day; and Christmas Day.

SECTION 17. In the interest of sanitation, the Corporation and the Union agree that other than food handlers will be required to clean toilets and washrooms.

ARTICLE III

QUARTERS AND LIVING CONDITIONS

SECTION 1. The Corporation agrees to furnish wholesome and adequate food to its employees at all times, including fresh milk, vegetables and meat. The Chef Cook shall have the right to make suggestions.

The crew shall cooperate in preventing waste and spoilage.

SECTION 2. Messrooms shall be equipped with suitable chairs or benches.

SECTION 3. (a) A sufficient number of lockers shall be provided so that each employee shall have one locker with space to store personal effects wherever reasonably located space permits.

(b) When improvements in quarters are contemplated the crews shall have the right to make suggestions in writing to the Corporation, through the boat committee.

SECTION 4. The Corporation agrees to supply the unlicensed personnel with the following items:

1. White sheets and pillow cases shall be changed weekly.
2. Clean blankets.
3. Face and bath towels twice weekly.
4. Standard brand of soap.
5. Safety matches.

SECTION 5. The Corporation agrees to make all reasonable efforts to maintain sanitary and comfortable quarters. All reasonable efforts will be made by both management and crew to keep quarters assigned for the use of the unlicensed personnel free of vermin.

It is understood that the crew will keep their own quarters clean and in a sanitary condition.

SECTION 6. The Corporation agrees to continue to furnish, maintain and keep available adequate First Aid equipment on all its boats at all times.

SECTION 7. All employees covered by this Agreement shall furnish a certificate from the U. S. Public Health Service, once each six (6) months showing themselves to be free of venereal disease. Cooks and waiters are to be examined as soon as practicable after being hired, and thereafter shall furnish certificate every three (3) months.

ARTICLE IV

SECTION 1. Wages, time off, tour of duty, transportation expenses, board and maintenance when not provided, and related matters, will be specifically set forth in Appendix "A" to this Agreement.

ARTICLE V

GRIEVANCES

(a) Any dispute or grievance arising in connection with provisions of this Agreement shall be settled in accordance with Supplement No. 1 to Administrative Order No. 202-2, which is made a part of this Agreement, and the following procedure:

1. Employees are encouraged to settle their complaints and grievances by first discussing them with their immediate supervisors, who shall make an

earnest effort to bring about a fair and reasonable solution to their problems. If the employee feels that his complaint cannot be impartially and satisfactorily adjusted by his immediate supervisor, he should then present his case to the Master of the vessel who will make every effort to effect an equitable settlement.

2. If the employee is dissatisfied with the decision of the Master, he or his representative may immediately appeal, in writing, jointly to the Personnel Officer and the Marine Superintendent, who will hear the case within five (5) working days and submit their findings, with recommendations, to the President of the Corporation for decision. The employee shall be notified within forty-eight (48) hours, in writing, of the decision of the President.

3. In case this decision is unsatisfactory, the employee or his representative has the right to appeal from this decision within ten (10) days, to an arbitration committee whose decision shall be final and binding on both parties involved insofar as they conform to Administrative Order No. 202-2 as amended, or as specified elsewhere.

The Arbitration Committee shall consist of one (1) representative of the employees, one (1) representative of the Corporation, and a third acceptable to both the Corporation and the employees. If the Corporation and the employee or employees are unable to agree on a third party within five (5) days, they shall request the Federal Mediation and Conciliation Director to appoint a neutral arbitrator. Each party to this Agreement shall pay the expenses of their representative and the third member's expenses shall be divided equally between the Union and the Corporation.

(b) Each of the steps must be followed in the order given.

(c) *Veterans* Section 14 of the Veterans' Preference Act of 1944 (Public 359, 78th Congress) authorizes the Civil Service Commission to consider appeals from employees entitled to Veterans' Preference, concerning decisions of the Corporation relative to discharges, suspensions of more than thirty (30) days, furloughs without pay, and reductions in rank and compensation. The Commission's decision is binding on the Corporation.

ARTICLE VI

SECTION 1. This Agreement shall become effective July 1, 1947, and shall continue in force until June 30, 1948, and thereafter from year to year unless either party gives thirty (30) days written notice of a desire to alter it. At least thirty (30) days before the expiration of this Agreement, either party wishing to make a change herein shall be required to submit written notice thereof including a specification of the desired changes or additions. If either party submits such written notice and specifications, then the other party, if it desires, may, at least fifteen (15) days before the expiration of this Agreement, submit written notice and specifications of its counterproposal, if any, for revision or additions to the Agreement. If said thirty (30) days notice has been submitted by either party and agreement to the proposed changes or additions to the Agreement has not been reached before the expiration date, the Agreement shall be automatically extended for a thirty (30) day period and thereafter as may be mutually agreed to in writing between the Corporation and the Union.

FOR THE UNION:

/s/ JOSEPH CURRAN
President

National Maritime
Union

FOR THE CORPORATION:

/s/ A. C. INGERSOLL, JR.
President

INLAND WATERWAYS
CORPORATION
Operating Federal

Exhibit 2

Pursuant to our conversation yesterday, I am taking this opportunity to apprise you of some of the surrounding circumstances involving the employment of National Maritime Union unlicensed personnel by the Panama Canal Company.

For many years, the Panama Canal Company has established as its policy the hiring of unlicensed personnel through the National Maritime Union Hiring Hall. The Company has not entered into any formal contract or agreement with the National Maritime Union, but it has been and still is its policy to apply to the unlicensed personnel of its respective vessels substantially the same wage scales and working conditions agreed to between the National Maritime Union and the representative organizations of the American steamship owners and operators.

The Panama Canal Company makes payments into the National Maritime Union Pension and Welfare Fund and the men are employed on a voyage basis, rather than as yearly employees. As distinguished from the unlicensed personnel, the deck and engine room officers on its vessels are Civil Service employees.

Furthermore, the Panama Canal Company has consistently paid its ill and injured employees maintenance under the General Maritime Law at the agreed NMU contract rate of $8.00 per day.

* * *

Cooper, Ostrin & De Varco
By Herbert J. DeVarco

HJDeV:SZ

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

JACOB RASSNER.

SUPREME COURT OF THE UNITED STATES

No. 429.—October Term, 1958.

James S. Patterson, General Administrator for Mobile County, Alabama, etc., Leonard Lester Sullivan, Melvin A. Hays, et al., Petitioners, *v.* United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 18, 1959.]

Per Curiam.

Petitioners, Melvin A. Hays, Sterling E. Duncan, and Leonard L. Sullivan, were injured in the course of their employment with the United States while aboard vessels operated by the Government and engaged in merchant service. Petitioner Patterson is the administrator of the estate of Edgar A. Doody, Jr., who died as the result of injuries sustained by him while he was similarly employed. Each of the petitioners filed a libel *in personam* against the United States under the Suits in Admiralty Act, 41 Stat. 525 *et seq.*, 46 U. S. C. § 741 *et seq.* The Court of Appeals for the Second Circuit affirmed dismissal of the libels on the ground that petitioners' exclusive remedy was under the Federal Employees' Compensation Act, 39 Stat. 742 *et seq.*, 5 U. S. C. § 751 *et seq.*, 258 F. 2d 702. We granted certiorari, 358 U. S. 898, to resolve a conflict between the decision below and that of the Court of Appeals for the Eighth Circuit in *Inland Waterways Corp.* v. *Doyle*, 204 F. 2d 874.

In *Johansen* v. *United States*, 343 U. S. 427, 441, the Court held "that the Federal Employees Compensation Act is the exclusive remedy for civilian . . ." employees of the United States on government vessels engaged in

public service and that the United States was therefore not liable to such employees under the Public Vessels Act, 43 Stat. 1112 *et seq.*, 46 U. S. C. § 781 *et seq.* The considerations which led to that conclusion are equally applicable to cases where the government vessel is engaged in merchant service. The United States "has established by the Compensation Act a method of redress for its employees. There is no reason to have two systems of redress." 343 U. S., at 439.[1]

The major portion of petitioners' argument, however, is addressed to the proposition that *Johansen* was incorrectly decided and that we should avail ourselves of this opportunity to reconsider it. We decline to do so. No arguments are presented by petitioners which were not fully considered in *Johansen* and rejected. "[W]hen the questions are of statutory construction, not of constitutional import, Congress can rectify our mistake, if such it was, or change its policy at any time, and in these circumstances reversal is not readily to be made." *United States* v. *South Buffalo R. Co.*, 333 U. S. 771, 774–775. If civilian seamen employed by the Government are to be accorded rights different from or greater than those which they enjoy under the Compensation Act, it is for Congress to provide them.[2]

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[1] It is worthy of note that in *Johansen* the Court expressly disapproved the decision in *United States* v. *Marine*, 155 F. 2d 456, in which a civilian employee of the Government was awarded damages under the Suits in Admiralty Act for injuries sustained by him while aboard a vessel operated by the United States in the merchant service.

[2] The Clarification Act of 1943, 57 Stat. 45, 50 U. S. C. App. § 1291, indicates that Congress has chosen with care the remedies which it has made available to civilian seamen employed by the United States. That legislation provided that "officers and members of crews . . . employed on United States or foreign flag vessels as employees of the United States through the War Shipping Adminis-

Accordingly, the judgments of dismissal entered against petitioners Hayes, Duncan, Sullivan, and Patterson are affirmed. We also affirm dismissal of the libel filed by petitioner Vallebuona, who has conceded that he could prevail only if *Johansen* were overruled.

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent.

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ration, . . . because of the temporary wartime character of their employment by the War Shipping Administration, shall not be considered as officers or employees of the United States for the purposes of the United States Employees Compensation Act, as amended . . . ."